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No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

EUGENE D., a minor, by and through his mother and next friend, OLIVIA D.,
Petitioner,

VS.

JOHN R. KARMAN, JR., MARGERY TAYLOR CHAPLEAU, SHERRY HAYDON BRUCE, MARY JOHNSTON BALLARD, MARCIA MILLER PUROL, PRUDA BIRD, ELLEN RECEVEUR WADE, and VICKY YOUNGMAN SCHWEICKHARDT,
Respondents.

On Petition for A Writ of Certiorari To the United States Court of Appeals For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether defendant state officials should be denied qualified immunity because, at the time relevant to this case, children involuntarily removed from the custody of their parents and placed in the custody of state officials for the purpose of rehabilitation and protection from harm had a clearly established right under the Due Process Clause of the Fourteenth Amendment to be provided with adequate food and medical care and to be protected from harm suffered as a result of the deliberate indifference of state officials responsible for their care?

LIST OF PARTIES

The parties to the proceedings below included: Plaintiff-Petitioner Eugene D., through his next friend, Olivia D., and Defendant-Respondents John R. Karman, Jr., Margery Taylor Chapleau, Sherry Haydon Bruce, Mary Johnston Ballard, Marcia Miller Purol, Pruda Bird, Ellen Receveur Wade, and Vicky Youngman Schweickhardt. Defendants are caseworkers and supervising personnel of the Kentucky social services agency, the Cabinet for Human Resources (formerly the Department of Human Resources and hereinafter "CHR"), who had responsibility for Eugene's care and treatment. At the time of the events complained of, Ballard, Purol, and Schweickhardt were caseworkers for CHR, the state social services agency. Wade had responsibilities as both a supervisor and a caseworker during Eugene's placement. Bruce and Chapleau were CHR employees responsible for the direct supervision of Eugene's caseworkers. Karman was a Family Service District Manager for CHR, responsible for, among other things, the supervision of workers and supervisors assigned to Eugene's case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Eugene D., by and through his next friend Olivia D., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding.

OPINIONS BELOW

On February 25, 1987, the United States District Court for the Western District of Kentucky entered an Order and Memorandum Opinion denying Defendants' Motion for Summary Judgment. The District Court's opinion is unreported and is attached as Appendix A-3-7. In an opinion issued on November 13, 1989,

a panel of the Sixth Circuit Court of Appeals, with Chief Judge Merritt dissenting, reversed the decision of the District Court. Eugene D. v. Karman, 889 F.2d 701 (6th Cir. 1989) (A-8-33). Rehearing and rehearing en banc was denied on January 22, 1990 (A-34).

JURISDICTIONAL STATEMENT

Jurisdiction of this action was originally premised on 28 U.S.C. Sections 1331(a) and 1343(3) and (4) and 42 U.S.C. Section 1983.

The Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit was entered on November 13, 1989. This Court has jurisdiction to review the judgment of the Sixth Circuit under 28 U.S.C. Section 1254(1). This petition for certiorari has been timely filed within 90 days of the entry of the Sixth Circuit's order denying rehearing on January 22, 1990.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Fourteenth Amendment, Section I and 42 U.S.C. Section 1983.

STATEMENT OF THE CASE

This case presents the question of whether Petitioner Eugene D., an abused and neglected child entrusted to the care and custody of state social services officials, had at least the same constitutional right to adequate food, medical care, and protection from bodily injury as convicted murderers and rapists in the state's custody. Petitioner Eugene D. is a mentally retarded and physically handicapped child who was placed in the custody of Kentucky social services officials when he was nine months old.[1]

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[1] All facts stated herein are based on the Amended Complaint (A-35-49) and the extensive record below. In denying defendants' motion for summary judgment, the district court found that evidence introduced by Eugene created genuine issues of material fact. (A-4, 6-7)

In a juvenile court action alleging that he was an abused or neglected child, Eugene was removed involuntarily from the custody of his mother and committed to the legal custody and control of the Kentucky Department of Human Resources (now the Kentucky Cabinet for Human Resources, hereinafter "CHR"). He was committed to that agency for the purpose of treatment and rehabilitation.[2]

For more than eight years following his commitment, Eugene was kept in a state-licensed foster home. He was nine years old in December 1982 when he was removed from that home and found to be suffering from starvation. He weighed only seventeen pounds and four ounces with his clothes on. His abdomen was sunken. His body temperature was more than eleven degrees below normal and he had no subcutaneous tissue or muscle. The pediatrician who saw Eugene on the day he was removed from the foster home told social services officials that an infection of any type would have led to his death in a matter of days.

In October 1984, Eugene brought this civil rights action seeking damages under 42 U.S.C. Section 1983 for violations of his right to be protected from harm and bodily injury while in state custody, a right protected by the Due Process Clause of the Fourteenth Amendment. Defendants are the social workers and supervisors responsible for his case during the entire time that he was placed in foster care. Although defendants were aware of his extreme dependency on others for protection, they persistently failed to monitor and supervise Eugene's foster home placement properly and adequately. These failures resulted in Eugene being deprived of adequate nutrition and medical care and caused him to suffer physical and mental injuries. Plaintiff alleges that defendants were deliberately indifferent to Eugene's serious medical needs.

Factual Background

The acts and omissions of caseworkers and supervisors that are the basis for Eugene's complaint occurred between May 1, 1974, and December 6, 1982. Each of the caseworkers and supervisors

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[2] Kent. Rev. Stat. Chap. 208.410 (1977).

assigned responsibility for Eugene during this time period knew or should have known about the nature and extent of his disabilities and special needs.

From the beginning of Eugene's placement in the state's custody, he suffered from multiple severe handicaps. He is mentally retarded and has spastic cerebral palsy. His arms and legs contract and require daily physical therapy by his caretaker in order to relax them. He is totally dependent upon others to feed him and to take care of his personal hygiene. His other disabilities —partial blindness, inability to walk, and very limited ability to communicate verbally—have always prevented Eugene from protecting himself, from running away from danger, or from calling for assistance.

On May 1, 1974, Eugene and a second severely handicapped child were placed by social services caseworkers in the foster home of Blanche Smith. Sometime thereafter a third severely handicapped child was placed in the home. In 1975 the child who had been placed at the same time as Eugene died, and in February 1976, defendants placed in the home yet another mentally retarded child with cerebral palsy. All three surviving children remained in Ms. Smith's home for the next six years.

Defendants did not take steps to ensure that Eugene was placed in a home that could meet his special needs. Although the Kentucky CHR operated "special needs" foster homes in which the foster parents were specially trained and qualified to care for handicapped children, Ms. Smith's home never met the criteria for approval as a special needs home. During the entire time of Eugene's placement, she never sought "special needs" certification and she declined to attend training that was available for foster parents taking care of disabled children. CHR officials never took steps to ensure that Ms. Smith received such certification or training.

Defendants failed to discharge their responsibility for Eugene's safety despite the warnings which began when Eugene had been in the Smith foster home less than a year. These concerns continued to be expressed throughout his placement by social workers who questioned Ms. Smith's ability to care for the foster

children placed in her home and by others who saw the children. Medical providers, school personnel, and other professionals who provided treatment and services to Eugene and his foster siblings, added their concerns to those of the caseworkers. They repeatedly observed and reported the adverse effect on the children's development and health of Ms. Smith's inability to meet the children's extraordinary needs. Defendants were thus regularly informed of the jeopardy in which Eugene was living.

An incident which occurred early in his placement illustrates the degree of defendants' indifference to Eugene's safety. In August 1976, during a regularly scheduled medical examination, doctors noticed that Eugene's left leg was swollen. X-rays revealed the leg to be broken. When questioned by doctors who examined Eugene, Ms. Smith told them that a babysitter had given passive exercises to Eugene two days before. However, hospital staff concluded from the X-rays that the break was at least ten days old. The hospital advised one of the defendant social workers that the medical staff did not believe the break to have been accidental; however, no investigation of the incident was ever conducted.

Professionals expressed concerns to caseworkers about Eugene's feeding and nutritional status as early as August 1975, when medical personnel began to suspect that Eugene's poor weight gain was due to Ms. Smith's using improper techniques in feeding Eugene and providing him with inappropriate food in insufficient amounts. Throughout Eugene's stay in the Smith foster home, nutritionists, nurses, and physicians continued to express these concerns. When Eugene began attending school, the staff there also repeatedly expressed concern about his nutrition. When he returned to school after weekends, school personnel noted that his weight had dropped. On two occasions Eugene had to be hospitalized for dehydration and on one of these admissions he was nearly in shock.

Eugene's medical as well as nutritional needs were continually neglected during his placement. This neglect also was brought to defendants' attention, but they repeatedly failed to respond. Their indifference to his medical needs is illustrated by the more than

two years it took for the defendant social workers to obtain a wheelchair that Eugene needed.

During the years Eugene was in state foster care, defendants did not ensure that he was taken to scheduled medical appointments even though they were well aware that Ms. Smith frequently failed to keep appointments for him with the neurology clinic, the eye clinic, the C & Y (Children and Youth) Comprehensive Care Clinic, the orthopedic surgeon, the physical therapist, and with Eugene's teachers, and the school nurse. Although Eugene's multiple handicaps required that he be closely followed, a pattern of missing appointments began shortly after his placement in the foster home. During his first year there, Eugene missed at least nine appointments at the comprehensive medical clinic. In early 1976, an evaluation at the cerebral palsy clinic recommended that he attend an infant stimulation program once a week. Several months later he was dropped from the program, however, because he had not attended.

After a delay of several years, Eugene was enrolled in the Churchill Park School for physically handicapped children where he was provided with intensive services, including physical therapy, environmental stimulation, supplemental feedings, and assistance in correcting his bite reflex. However, Eugene was kept home from school frequently, in some quarters missing more days than he attended. When he did attend school, the school nurse repeatedly noted his deteriorating condition. Again and again she reported to the caseworker that Eugene was coming to school dirty. When he returned to school after the 1982 summer vacation, she called the caseworker once again, this time to report that Eugene had lost two and one-half pounds over the summer and that he had bleeding gums.

Finally, early in the fall of 1982, caseworkers and supervisors decided to close the Smith home. Despite this decision and even though school personnel continued to report their concerns about Eugene to the caseworker, Eugene and the other children remained there for several more months.

When Eugene was removed from the Smith home on December 6, 1982, the doctor who examined him found that he had been

so deprived of food that his body had begun to eat its own body tissues to the point that he had no muscle mass and no subcutaneous tissue. His bones were demineralized, probably caused by severe malnutrition and inactivity. His ribs were protruding and his hips had to be wrapped in gauze for fear that his bones would break through his skin. After only one week in a new foster home, Eugene had gained almost a pound. During that first week, no medication had been prescribed and no surgery had been performed on Eugene. No illness or infection was detected which would have accounted for his malnutrition. The only factor which had changed was his caretaker. Ms. Smith had been replaced by a foster mother with experience in caring for handicapped children. Once Eugene was fed properly and given sufficient quantities of food, he gained weight. Nine months later he weighed 26 pounds.

Procedural History

Defendants initially raised the issue of qualified immunity in a motion to dismiss filed prior to answering Eugene's original complaint. On June 25, 1985, the district court denied defendants' motion to dismiss. Although this Court had decided *Mitchell v. Forsyth*, 472 U.S. 511 (1985), prior to the district court's order, defendants did not pursue an interlocutory appeal from the denial of qualified immunity. Both sides then engaged in extensive discovery after which the defendants filed a motion for summary judgment renewing their defense of qualified immunity and arguing that there were no material issues of fact.

On February 25, 1987, the district court issued a Memorandum Opinion denying defendants' motion for summary judgment. (A-3 to 7) The court found that Eugene's Section 1983 claim was in essence an "allegation that the defendants were deliberately indifferent to the serious medical needs of the plaintiff" and that discovery revealed "differing opinions of experts and factual circumstances that are subject to differing inferences." (A-3). Judge Allen concluded that there were material issues of fact which precluded summary judgment for defendants.

On the issue of qualified immunity, the district court reached the same conclusion it had reached earlier. Relying primarily upon *Estelle v. Gamble*, 429 U.S. 47 (1976) and several earlier

circuit court opinions, the court held that "[i]t is clear that during the period between 1973 and 1982, it was well established that there was a constitutional right of a person in custody to be free from harm resulting from deliberate indifference." (A-6). The court further concluded that reasonable persons in defendants' position would have known that their conduct violated clearly established constitutional rights. Defendants appealed.

The United States Court of Appeals for the Sixth Circuit, with Chief Judge Merritt dissenting, reversed the district court's denial of defendants' motion for summary judgment. Disagreeing with the district court's characterization of the right at issue, it interpreted *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and this Court's more recent decision in *Anderson v. Creighton*, ____ U.S. ____, 107 S.Ct. 3034 (1987), to require Eugene to demonstrate that courts had explicitly recognized "the right of a foster child to be protected from bodily harm at the hands of a state-licensed foster parent." *Eugene D. v. Karman*, 889 F.2d 701, 707 (6th Cir. 1989). Absent decisions explicitly recognizing such a right in virtually identical factual circumstances, the defendants were held to be entitled to qualified immunity. Although presented with caselaw meeting this rigid standard, the Circuit Court, as a matter of law, found the precedents insufficient to clearly establish the law in the Sixth Circuit.

In dissent, Chief Judge Merritt construed the majority's opinion as giving "a rigid and wooden reading to the Supreme Court precedents on qualified immunity." *Eugene D.* at 712. He urged that *Anderson v. Creighton* does not require an identical case previously decided by the Supreme Court or the Sixth Circuit in order for the law to be clearly established. He noted that protection of children who are wards of the state "has a history going back to the Magna Carta and beyond." *Id.*

REASONS FOR GRANTING THE WRIT

When Eugene entered the state's custody he was a nine month old infant totally dependent upon others for food, shelter, medical care, and other basic needs. His numerous handicaps left him wholly dependent upon the defendants and the foster parent with

whom they placed him for the next eight years. Despite evidence that he had been denied basic human needs and physically abused while in the state's custody, the Court of Appeals held that the defendant state officials, who were responsible for Eugene's protection and rehabilitation during that eight years, were entitled to immunity from suit because they had not violated any clearly established constitutional rights of Eugene. It concluded that reasonable caseworkers and their supervisors could not know that foster children, placed in their custody solely for protection and treatment, had any constitutional rights to even the most basic human needs.

In granting defendants qualified immunity, the Sixth Circuit misapplied this Court's holdings in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982) and *Anderson v. Creighton* ___ U.S. ___, 107 S.Ct. 3034 (1987). An overwhelming body of caselaw which clearly established the constitutionally required minimums of care for persons in state custody and which satisfied *Harlow's* standard for defeating official's qualified immunity was ignored by the Court of Appeals. Its characterization of the right which must be clearly established in order to defeat a claim of qualified immunity goes far beyond the "contours of the right" required by *Anderson.* As a result, it shifts the balance this Court fashioned in *Harlow* decidedly in favor of state officials to the detriment of those who have been injured by the unlawful conduct of those officials.

The Sixth Circuit's decision is in conflict with other circuits' rulings both on the level of specificity at which a right must be established in order to satisfy the *Anderson* test and also in conflict with other circuits' holdings on the degree of factual similarity between cases that is necessary in a determination of clearly established constitutional rights. The Court of Appeals decision also conflicts with another circuit's ruling on the weight to be afforded to "out of circuit" caselaw in determining whether the law is clearly established, absent binding precedent in its own circuit.

Finally, the Court of Appeals misread the implications of this Court's decision in *DeShaney v. Winnebago County Department of Social Services,* ___ U.S. ___, 109 S.Ct. 998 (1989) and decided an important question of federal constitutional law which

this Court left unresolved in that case. The substantive due process rights of children taken into state custody for protection from parental abuse or neglect, left unanswered in *DeShaney*, should be settled by this Court.

I

THE SIXTH CIRCUIT MISAPPLIED THE PRINCIPLES GOVERNING STATE OFFICIALS' ENTITLEMENT TO QUALIFIED IMMUNITY ESTABLISHED BY THIS COURT.

Under *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982), qualified immunity is available only to those officials whose conduct conforms to a standard of "objective legal reasonableness." The officials' actions must be assessed in the light of the legal rules that were clearly established at the time of the allegedly unlawful conduct. *Harlow* at 818. This objective standard is designed to protect the public interest in deterrence of and compensation for an official's unlawful conduct while safeguarding the official's ability to make difficult decisions with independence and without fear of consequences. *Harlow* at 819. Where the conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known, the official is not entitled to immunity. *Harlow* at 818.

Prior to and during Eugene's foster care placement, a long line of cases from this Court and the lower federal courts established that persons in state custody, including state foster care, had constitutional rights to be protected from harm and to be provided with adequate food and medical care by their state custodians. The Sixth Circuit ignored this clearly established and substantial body of caselaw and failed to follow the mandate of this Court set forth in *Harlow*.

A. A Substantial Body of Caselaw That Existed at the Time of Petitioner's Confinement Clearly Established the Constitutional Rights Which Defendants Are Alleged to Have Violated Thereby Defeating Their Claim for Qualified Immunity Under *Harlow V. Fitzgerald*

Both decisions of this Court and a substantial body of caselaw in the lower federal courts provided an overwhelming weight of authority which clearly established the constitutional rights of persons in the state's custody. These decisions put any reasonable state social services officials on notice that deliberate indifference to Eugene's basic human needs for medical care, food, and protection from harm deprived him of his constitutional right to due process.

In *Ingraham v. Wright,* 430 U.S. 651, 661 (1977), this Court noted that "Blackstone catalogued among the absolute right of individuals the right to security from corporal insults of menaces, assaults, beatings and woundings". A year earlier, in *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), this Court held that convicted criminals had a constitutional right to medical care and a cause of action against prison officials who engaged in "acts or omissions sufficiently harmful to evidence deliberate indifference to [their] serious medical needs". In *Youngberg v. Romeo*, 457 U.S. 307 (1982), this Court recognized that the rights of mentally handicapped persons placed in the state's custody extended beyond those afforded to prisoners. As the Tenth Circuit noted in *Garrett v. Rader*, 831 F.2d 202, 203 (10th Cir. 1987):

> "While *Youngberg* did establish for the first time the obligation of a state to provide a minimal level of specialized training for patients in mental institutions, the *Youngberg* court also recognized the existence of *a well established due process* due to provide reasonably safe living conditions and to otherwise make adequate provisions for the personal security of patients."

[emphasis added]

Youngberg recognized that certain basic minimums had long been acknowledged as part of the state's duty when it assumes custody of someone.

The Sixth Circuit ignored a series of lower federal court decisions explicitly affirming the rights of foster children. *Doe v. New York City Dep't of Social Services*, 649 F.2d 134 (2nd Cir. 1981) cert. denied 464 U.S. 864 (1983); *Brooks v. Richardson*, 478 F.Supp. 793 (S.D. N.Y. 1979); *Gary W. v. State of Louisiana*, 437 F.Supp. 1209 (E.D. La. 1976).

In *Doe v. New York City Department of Social Services* a foster child alleged that officials had been deliberately indifferent to her safety while she was in a foster home. During her six years in that home she had been repeatedly sexually abused by the foster father. As in Eugene's case, the defendant officials were responsible for selecting and licensing the home and supervising her care. In yet another similarity to Eugene's case, Maria Doe alleged that officials ignored reports of concern from others throughout the years she was in the foster home. The Second Circuit held social services officials shown to be deliberately indifferent "to a known injury, a known risk, or a specific duty" towards a child in their care could be held liable to that child in an action for damages. *Doe* at 145.

The plaintiffs in *Gary W. v. Louisiana*, decided in 1976, included handicapped children, like Eugene, who had been committed to the custody of state child welfare officials. A Louisiana district court held that those state officials had a constitutional obligation to protect the children from abuse, neglect, and mistreatment.

Brooks v. Richardson, decided in 1979, involved children, like Eugene, committed to the custody of social service officials who then placed them in foster homes where they were alleged to have been abused or neglected. The children in *Brooks*, again like Eugene, had been removed from their parents' home by the court to ensure that they received proper care. Judge Cannella held that "[a] child who is in the custody of the state and placed in foster care has a constitutional right to at least humane custodial care." *Brooks* at 795. Pointing out the absurdity of suggesting that foster children had no right to protection, he noted, "[i]t would be ludicrous if the state, through its agents, could perpetuate the same evil the Family Court sought to prevent," *Brooks* at 796.

Even before Eugene was placed in the defendants' custody courts from several circuits already had recognized that children placed in the custody of the state were entitled to constitutional protections. *Martarella v. Kelly,* 349 F.Supp. 575 (S.D. N.Y. 1972), *Nelson v. Heyne,* 355 F.Supp. 451 (N.D. Ind. 1972) aff'd 491 F.2d 352 (7th Cir. 1974) cert. denied 417 U.S. 976 (1974), *Inmates of Boys' Training School v. Affleck,* 346 F.Supp. 1354 (D.R.I. 1972).[3] These and other similar cases explicitly recognized the rights of children to an adequate diet and medical care while in the state's custody. E.g., *Affleck* at 1373; *Gary W. v. State of Louisiana* 437 F. Supp. 1209, 1226 (E.D. La. 1976).

The plaintiff class in *Affleck* included dependent and neglected children, like Eugene. About them the court cautioned defendants: "Children who are committed to the BTS because they are dependent or neglected . . . are at the BTS because of their parents' actions, not their own. To cause them to suffer deprivations under law because of their status is constitutionally forbidden." *Affleck* at 1371-1372, [citations omitted]. Similarly, the Seventh Circuit required that "[w]hen a state assumes the place of a juvenile's parents, it assumes as well the parental duties, and its treatment of its juveniles should, so far as can be reasonably required, be what proper parental care would provide", *Nelson* 491 F.2d at 360. The defendants' neglect of Eugene while he was in the state's custody was so pervasive and longstanding that it is

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[3] Although some of the planitiffs in these cases were confined for delinquent acts, truancy, or ungovernability, the factual similarities between them and Eugene far outweigh this difference in the reason for their confinement. The cases of delinquent, status offender, and abused children were heard by the same courts, in proceedings governed by the same statutory statements of purpose, and their care was often entrusted to the same state officials. *Martarella,* (Commissioner of Social Services included as defendant); *Inmates of Boys' Training School v. Affleck,* 346 F.Supp. 1354 (D.R.I. 1972) (defendants include Director of Rhode Island Department of Social and Rehabilitative Services and the Assistant Director in charge of the Division of Children and Youth Services). A reasonable state official confronted with these cases would be expected to conclude that Eugene was entitled to at least as great protections as the confined delinquent youth.

clear he did not receive anything remotely approximating "proper parental care".

Caselaw decided before Eugene was taken into the state's custody also established that under the Due Process Clause mentally retarded persons confined to an institution were guaranteed, among other rights, the right to protection from assault by fellow residents or staff, and provision of necessary medical care and treatment. *New York State Association for Retarded Citizens v. Rockefeller,* 357 F. Supp. 752, 764-765 (E.D. N.Y. 1973).

In the same year that Eugene was placed in foster care the Seventh Circuit decided *Spence v. Staras,* 507 F.2d 554 (7th Cir. 1974). In *Spence* the court upheld a substantive due process claim brought on behalf of a retarded child who was beaten and killed by fellow patients. The defendant state officials, though not alleged to have beaten the child themselves, were accused of failing to protect the child from the abuse of others with whom they had placed him. Like the caseworkers and supervisors in Eugene's case, they had ignored repeated warnings and indications that the child was at risk.

Throughout the 1970's circuit courts consistently reaffirmed the constitutional right of persons in state custody to be free from harm and their right to receive adequate food and medical care. *Fitzke v. Shappell,* 468 F.2d 1072, 1076 (6th Cir. 1972); *Woodhous v. Virginia,* 487 F.2d 889 (4th Cir. 1973); *Gates v. Collier,* 501 F.2d 1291, 1301 (5th Cir. 1974); *Norris v. Frame,* 585 F.2d 1183, 1187 (3rd Cir. 1978); *Ramos v. Lamm,* 639 F.2d 559 (10th Cir. 1980) cert. denied 450 U.S. 1041. (1981)[4]

B. The Sixth Circuit Characterization of the Right Which Must Be Clearly Established Conflicts With This Court's Holding in *Anderson v. Creighton*

In Eugene's case, the Sixth Circuit misapplied this Court's qualified immunity principles and extended official immunity

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[4] Many of these cases involved convicted prisoners, who unlike Eugene, could be subjected to conditions of confinement and punishment that were not cruel and unusual.

beyond the bounds of reason and common sense. The court focused upon the following language from *Anderson*:

> the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

107 S.Ct. at 3038-9.

In applying this "particularized right" language, it concluded that under *Anderson* those officials responsible for Eugene's injuries are immune from suit unless he can show that there was language in an opinion of this Court or in some unspecified number of lower court opinions which explicitly recognized the "right of a foster child to be protected from bodily harm at the hands of a state-licensed foster parent," *Eugene D.* at 707. If Eugene is to prevail, the court requires that this precise formulation of the right must be shown to have been adopted by other courts.

The Sixth Circuit's holding ignored the admonition in *Anderson* that "this is not to say that an official action is protected by qualified immunity unless the very act in question has previously been held unlawful . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson* at 3039. As the Ninth Circuit cautioned in a post-*Anderson* decision:

> The qualified immunity regime of clearly established law should not be held to allow Section 1983 defendants to interpose lawyerly distinctions that defy common sense in order to distinguish away clearly established law.

Wood v. Ostrander, 879 F.2d 583, 593 (9th Cir. 1988) petition for cert. filed 3/5/90, No. 89-1409; *See also, Savidge v. Fincannon*, 836 F.2d 898,908 n. 54 (5th Cir. 1988). Although *Anderson* explicitly did not extend qualified immunity beyond the bounds established in *Harlow*, *Anderson* at 3040 n.3, the Sixth Circuit did extend state officials' immunity and permits them to "hide behind a claim that a particular factual predicate in question has

never appeared in *haec verba* in a reported opinion." *Little v. Walker*, 552 F.2d 193, 197 (7th Cir. 1977).

Eugene asserts that his clearly established constitutional rights were, at minimum, the same rights afforded to prisoners, pretrial detainees, incarcerated juvenile delinquents, and the institutionalized mentally handicapped. These rights included the right of a person involuntarily committed to the custody of the state to be provided with adequate food and medical care and to be protected from harm by state-appointed caretakers.

Eugene's asserts that the scope of his substantive due process rights are related to the purposes for which he was placed in the state's custody. *Jackson v. Indiana* 406 U.S. 715, 738 (1972). It would be anomalous if children taken into state custody for the explicit purpose of protection were entitled to fewer protections than those afforded prisoners or other adults in state custody as a result of a criminal prosecution. As this Court noted in *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982):

> "If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions."

Eugene bases his claim upon the well-established and specific constitutional rights of persons in state custody recognized by this Court and lower federal courts. His complaint is not based upon a general claim that the defendants' conduct was unlawful because it "shocks the conscience" or "offends those canons of decency and fairness which express the notions of justice of English speaking peoples." *Bendiburg v. Dempsey*, 707 F.Supp. 1318, 1324 (W.D. Ga. 1989). Were Eugene to allege such abstract rights he might run afoul of *Anderson*'s proscription regarding the need to specify the contours of the right allegedly violated. The circuit court misapplied this Court's holding in *Anderson* when it determined that he had done so.

C. The Sixth Circuit Requirement That Cases Be Factually Identical in Order to Defeat a Claim of Qualified Immunity Conflicts With This Court's Holdings in *Anderson v. Creighton* and *Harlow v. Fitzgerald*

Unlike prisoners, Eugene had no access to a law library; he could not draft pro se motions or petition the courts for relief. It was difficult for him to communicate on even the most basic level. Nor did he have access to the mails or the media to voice his complaints and to explain the pain and deprivation he suffered while under the "benevolent" care of defendants. Certainly, if prisoners who can do these things to protect themselves are entitled to protection and satisfaction of certain basic human needs, reasonable state officials could not assume that a handicapped infant in their custody was entitled to any less.[5]

Nevertheless, the Circuit Court required that Eugene point to a line of cases involving factual circumstances virtually identical to his own in order to defeat the defendants' claims of immunity. Cases involving prisoners and adults in custody are too different, the court held.[6] It also rejected the entire line of cases which set forth minimum constitutional protections required for others in

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[5] Almost a quarter century ago, this Court held that "Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault*, 387 U.S. 1, 13 (1967). Petitioner's status as a juvenile offers no excuse for the unlawfulness of the alleged conduct of defendants. *Germany v. Vance*, 868 F.2d 9,16 (1st Cir. 1989) (rejecting "any implication that the consitutional right of access to the courts does not apply to juveniles in [state] custody" and holding that the right was sufficiently clear in 1980, based on cases involving adult prisoners, to preclude qualified immunity for the caseworkers and administrator. *Id.* Chief Judge Pettine made this same observation 17 years earlier in *Inmates of Boys' Training School v. Affleck*, 346 F.Supp. 1354, 1364 (D.R.I. 1972): "There is no age limitation contained in the constitutional quarantee of due process." [citations omitted] *See also, Riddle v. Innskeep*, 675 F.Supp. 1153,1159 (N.D. 1987).

[6] As previously discussed *supra* in Section I. B, the Circuit Court effectively precluded consideration of these cases by insisting on a narrower characterization of the right than that required under *Harlow/Anderson* principles.

state custody—pretrial and convicted juvenile delinquents, truant or ungovernable children, and mental patients. According to the Sixth Circuit, those cases are irrelevant in establishing any minimal constitutional protections for abused and neglected children in state custody. It concluded that abused and neglected children committed to the state's protective custody are entitled to less protection than convicted rapists and murderers in prisons.

Factual similarity is crucial in qualified immunity determinations involving probable cause. As the Fifth Circuit noted recently "the notion of probable cause is inherently abstract and gains meaning only from particular circumstances", *Melear v. Spears*, 862 F.2d 1177, 1183-84 (5th Cir. 1989). When the Sixth Circuit focused upon the need for factual similarity between cases, it failed to draw an important distinction between Eugene's claim and the factually complicated search and seizure cases. The delicate balancing of facts which makes factual similarity so crucial in Fourth Amendment cases is absent in Eugene's case. In Eugene's case the crucial fact, the one which gives rise to the state's duty to him, is his involuntary placement in the state's custody. Certain basic minimum standards of care are required of his state custodians.

Nothing in *Harlow* or *Anderson* suggests the kind of factual identity of caselaw requirement that the Sixth Circuit applies in this case. The circuit court refers to no delicate balancing of interests similar to that which is inherent in the Fourth Amendment context. There was no competing interest on the part of the foster parent to keep Eugene in her home. The caseworkers' selection and monitoring of a foster home for Eugene was not dependent upon any balancing of his rights and those of his mother. There was no other legitimate governmental objective interfering with these officials' obligation to protect Eugene and ensure he received proper treatment while in their custody.

In fact, at the time of Eugene's confinement there were well-established clear constitutional principles forbidding the defendants' deliberate indifference towards Eugene's health and safety. As Chief Judge Merritt notes in his dissent, "[t]he rights of helpless children who are wards of the state has a history going back to the Magna Carta and beyond . . . . The law of England in

1215 protected wards against abuse by the state . . ." *Eugene D.* at 712.

II

THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS FROM THE THIRD, EIGHTH, AND TENTH CIRCUITS ON THE RELEVANT LINE OF CASES FOR DETERMINING WHETHER THE LAW IS CLEARLY ESTABLISHED

As discussed supra, the Sixth Circuit fails to follow the dictates of *Harlow* and *Anderson* and extends the boundaries of official immunity beyond the parameters set forth by this Court. It errs when it holds that *Estelle v. Gamble, supra,* and numerous other similar decisions in the circuit and district courts provide no clearly established legal rules applicable to children in state custody for their own protection. The Sixth Circuit's rejection of factually analogous caselaw from its own and other jurisdictions also conflicts with the rulings in other circuits.

A number of circuits have not required the kind of factual identity or similarity that the Sixth Circuit requires in Eugene's case. The Tenth, Eighth, and Third Circuits have adopted an approach "requiring some but not precise factual correspondence and demanding that officials apply general, well-developed legal principles." *Garcia by Garcia v. Miera*, 817 F.2d 650, 657 (10th Cir. 1987) cert. denied ____ U.S. ____, 108 S.Ct. 1220 (1987); *Ryan v. Burlington County N.J.*, 860 F.2d 1199, 1208 (3rd Cir. 1988) cert. denied sub. nom. *Fauver v. Ryan* ____ U.S. ____, 109 S.Ct. 1745 (1989); *People of Three Mile Island v. NRC*, 747 F.2d 139, 144 (3d Cir. 1984); *Lappe v. Loeffelholz*, 815 F.2d 1173, 1177 (8th Cir. 1987). *Boswell v. Sherburne County*, 849 F.2d 1117, 1121 (8th Cir. 1988) cert. denied sub. nom. *Witschen v. Boswell* ____ U.S. ____, 109 S.Ct. 796 (1989); See also, *Whisenant v. Yuam*, 739 F.2d 160, 164 (4th Cir. 1984) (*Estelle v. Gamble* is "clearly established" law for purposes of determining state official's duty to pretrial detainees).

Following *Anderson v. Creighton*, several other circuits, while not explicitly adopting the approach discussed above, have looked

to factually analogous but not identical cases in making their determination of clearly established law. For example, the Ninth Circuit, in *Chalkboard, Inc. v. Brandt*, 879 F.2d 668 (9th Cir. 1989), held that clearly established law in employee discharge cases was sufficiently analogous so as to defeat social services officials' claims of qualified immunity in a case involving a day care center's license. In another post-*Anderson* case, this from the Eleventh Circuit, this Court's decision in *Ingraham v. Wright* was found to provide the well-established legal principle which is cited as the basis for rejecting a sheriff's defense of qualified immunity in a case alleging violation of a pre-conviction detainee's liberty interest in freedom from harm. *Parker v. Williams*, 862 F.2d 1471 (11th Cir. 1989) 1477 n. 6.[7]

The Sixth Circuit's refusal to apply well-established legal principles from factually analogous cases conflicts with the weight of authority in the other circuits.

III

THERE IS A CONFLICT AMONG THE CIRCUITS CONCERNING THE WEIGHT TO BE AFFORDED DECISIONS FROM OTHER CIRCUITS IN DETERMINING "CLEARLY ESTABLISHED LAW" FOR PURPOSES OF QUALIFIED IMMUNITY

At the time Eugene was in the state's custody, several district and circuit courts outside the Sixth Circuit had explicitly recognized the constitutional rights of children not to be deprived of humane care and treatment while in state custody and not to be placed in danger through state action. At the same time not a single decision of the federal courts had denied children these protections. The Sixth Circuit erroneously concluded that this

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[7] Although not a qualified immunity case, the Eleventh Circuit has held that a child in foster care did have a Fourteenth Amendment right to be protected from harm. *Taylor v. Ledbetter*, 818 F. 2d 791 (11th Cir. 1987) cert. denied ____ U.S. ____, 109 S.Ct. 1337 (1989). The court relied upon some of the very same cases that the Sixth Circuit concluded could not provide the legal rules applicable to children in foster care.

body of case law was insufficient, as a matter of law, to clearly establish, at any time during his eight and one-half years in custody, that Eugene had a right to adequate food and medical care and to be protected from harm while in the state's custody. The standard it applies in determining "clearly established law" is at odds with the criteria applied in other circuits.

No precise rules have been established for determining what precedent is to be used to decide whether an alleged right in question is clearly established. Some courts suggested that this Court's refusal to address an issue does not mandate the conclusion that the law is unclear, *Garcia by Garcia v. Meara*, 817 F.2d 650, 657 (10th Cir. 1987) cert. denied ____ U.S. ____, 108 S.Ct. 1220 (1987); *Cleveland-Purdue v. Brutsche*, 881 F.2d 427, 430 (7th Cir. 1989). Others have held that a Supreme Court decision in an analogous case is not imperative before the law may be considered "clearly established." *Gann v. Schram*, 606 F.Supp. 1442, 1449 (D. Del. 1985). Even a conflict between two courts outside the circuit may be "relevant to the *Harlow* inquiry but not controlling" on the issue of whether the law is clearly established. *Garcia* at 658. This Court specifically reserved the question in *Harlow*, at 818 n.32, stating that "[a]s in *Procunier v. Navarette* we need not define here the circumstances under which "the state of the law" should be evaluated by reference to the opinions of this Court, of the Court of Appeals or of the local District Court." As a result, "lower courts are not informed whether two conflicting opinions from different district courts, or even a split decision in the court of appeals, makes the law suficiently unclear to mandate the granting of immunity," *People of Three Mile Island v. Nuclear Regulatory Commission*, 747 F.2d 139, 144 (3d Cir. 1984).

The absence of controlling precedent in the circuit is not the determinative factor in qualified immunity cases. The "clearly established" rule suggests, but this Court has left unresolved, that decisions from other jurisdictions, even state court opinions, *see, e.g. Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986) *cert. denied* 483 U.S. 1020 (1987) can be the basis for rejecting an official's claim of qualified immunity. In the absence of direction from this Court, the lower courts have disagreed upon

the effect that should be given to decisions by other district courts and other circuits.

The Ninth Circuit has followed a two step approach to the "clearly established" analysis. First, absent binding precedent in the circuit, the court advises looking at all available decisional law including decisions of *state* courts and other circuits. Second, the Ninth Circuit's analysis requires that:

> Where there are few cases on point, and none is binding, an additional factor that may be considered in ascertaining whether the law is 'clearly established' is a determination of the likelihood that the Supreme Court or this circuit would have reached the same result as the nonbinding authorities at the time.

Wood v. Ostrander, 879 F.2d 583, 593 (9th Cir. 1989), pet. for cert. filed 3/5/90 No. 89-1409, *citing Capoeman v. Reed*, 754 F.2d 1512, 1515 (9th Cir. 1985), *Ward v. County of San Diego*, 791 F.2d at 1332. See also *Walnut Properties, Inc. v. City of Whittier*, 861 F.2d 1102 (9th Cir. 1988).

In petitioner's case, the Sixth Circuit held that factually very similar cases from another district and circuit court could not clearly establish the law for purpose of qualified immunity in its jurisdiction. Without any citations to this Court's opinions governing qualified immunity, the Sixth Circuit panel states "our court will not be easily swayed by the decisions of the circuit and district courts other than our own when determining whether a consitutional right has been clearly established in this circuit", *Eugene D.* at 708. In essence, the Sixth Circuit converts the clearly established rule into one requiring controlling precedent. A factually identical decision from either the Supreme Court or its own circuit is required in the absence of which the defendants are entitled to qualified immunity. This holding conflicts with the Ninth Circuit's decision in *Wood v. Ostrander, supra.*

In *Wood v. Ostrander*, the court held that a factually similar case from another circuit was a sufficient basis for rejecting defendants' claims that the law was not clearly established. Linda Wood was a passenger in a car that the police ordered to pull to the side of the road. Ostrander arrested the driver and had the car

towed. At 2:30 in the morning, he left Ms. Wood stranded in a high crime area five miles from her home. As she was walking home a stranger picked her up, took her to a secluded area and raped her. In rejecting Ostrander's qualified immunity defense, the Ninth Circuit relied upon an earlier decision of the Seventh Circuit, *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979). In *White*, police officers arrested the driver of a car and left his three nephews and nieces, all young children, in the abandoned car beside the road. The Seventh Circuit reversed the district court's dismissal of the children's Section 1983 complaint against the officers. It held that the when police officers' official actions place children in danger, their failure to help the children "indisputably breaches the Due Process Clause," *White* at 383.

Eugene alleges that the deprivation of his constitutional rights occurred while he was in state custody between 1974 and December, 1982. Even if very close factual similarity of caselaw is a prerequisite for qualified immunity "clearly established law", there existed at the time of his commitment a series of cases from other circuits which bear a close factual similarity to his case, either because they involved children in state custody, See Section I. A. *supra* at pp. 10-14, or they involved children placed in danger by state actions, *White v. Rochford,* 592 F.2d 381 (7th Cir, 1979).

This Court should grant certiorari to resolve the important dispute among the circuits over the weight to be afforded to decisions outside the circuit in determining whether the law, for purposes of the qualified immunity defense, is clearly established within that circuit.

IV

THIS COURT SHOULD GRANT CERTIORARI TO ELIMINATE THE CIRCUIT COURTS' MISREADING OF THIS COURT'S DECISION IN *DeSHANEY v. WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES*

Last term, in *DeShaney v. Winnebago County Department of Social Services*, this Court held that state officials had no obligation, under the Due Process Clause of the Fourteenth Amend-

ment, to protect a child from violence at the hand of his natural parent. In a footnote to that opinion, the Court stated:

> Had the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect. . . . We express no view on the validity of this analogy, however, as it is not before us in the present case.

109 S.Ct. 1006 n. 9.

The Court's language in *DeShaney* figures prominently in the Sixth Circuit's decision in Eugene's case.[8] Judge Engel notes that *DeShaney* "makes clear [that] the cases relied upon by Eugene can be read to support his assertion that the Due Process Clause of the Fourteenth Amendment imposes affirmative duties on the state whenever it takes an individual into custody," *Eugene D.* at 709. Later in the opinion he refers to "the gloss that *DeShaney* puts on the cases," *Eugene D.* at 110. However, the court then rejects the case law Eugene cites as insufficient to clearly establish the right necessary to defeat defendants' claim of immunity.

Actions by this Court since *DeShaney* have, if anything, led to further confusion over the rights of children harmed by the acts or omissions of state officials. Shortly after issuing its decision in *DeShaney*, this Court denied certiorari in an Eleventh Circuit case, *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (en banc), cert. denied, ____ U.S. ____, 109 S.Ct. 1337 (1989). As a result of abuse by her foster parents, Mary Jo Taylor lapsed into a coma from which she has not recovered. The en banc court in *Taylo*r held that state officials who are deliberately indifferent to

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[8] A petition for certiorari in *Doe v. Bobbitt*, 881 F.2d 510 (7th Cir. 1989) petition for cert. filed 1/22/90, No. 89-1218, another foster care case, "submits that the Seventh Circuit has misread the rule of *DeShaney* to mean that no child [including a child under the custody of state officials] has an affirmative right to protection under any circumstances . . ." Petition for Certiorari at 22.

the welfare of a child in foster care violate that child's rights under the Due Process Clause of the Fourteenth Amendment.

Following its denial of certiorari in *Taylor*, this Court refused to review the Fourth Circuit's decision in *Milburn v. Anne Arundel County Department of Social Services*, 871 F.2d 474 (4th Cir. 1989) cert. denied ___ U.S. ___, 110 S.Ct. 148 (1989). Charles Milburn was placed in foster care when he was less than two years old. On four separate occasions while he was in the foster home, he suffered significant injuries, each requiring medical treatment. Six months after his placement, his leg was broken and he was seen with multiple bruises. Several months later, he was treated for a deep laceration over his left eye. Three months after this incident, both his hands and wrists were burned and badly disfigured when the foster parents immersed and held them in hot water. A few months later, his leg was broken again.

In sustaining the dismissal of Charles' Section 1983 action against, among others, the social services caseworkers and supervisors, the Fourth Circuit relied upon *DeShaney* as "dispositive of most of the issues in this case," *Milburn* at 476. It concludes that "[t]he most that any of [the defendants] might be charged with was a failure to protect the plaintiff against private violence," Id.

The confusion created by *DeShaney* is further illustrated by the Third Circuit's opinion in *Stoneking v. Bradford Area School District (Stoneking II)*, 882 F.2d 720 (3d Cir. 1989) *cert. denied* ___ U.S. ___, 110 S.Ct. 840 (1990). Kathleen Stoneking alleged that while she was a high school student she was sexually abused by the director of the school band. The defendants included school officials who were alleged to have responded recklessly to earlier reports of abuse by the band director and failed to take appropriate steps to ensure that he did not abuse students. In an earlier opinion, *Stoneking v. Bradford Area School District (Stoneking I)*, 856 F.2d 594 (3d Cir. 1988), *vac. and remanded* ___ U.S. ___, 109 S. Ct. 1333 (1989), the court had rejected the defendants' qualified immunity claim. Noting that "[i]t is uncontestable that [state] custodians have some duty to protect those in their custody from physical abuse by third persons," *Stoneking I* at 600 (citations omitted), the court, in

part, relied upon cases such as *Taylor v. Ledbetter* and *Doe v. New York City Department of Social Services, supra.*

Stoneking I was vacated and remanded in light of *DeShaney*. Upon remand, the court noted that certiorari has been denied in *Taylor v. Ledbetter* but chose not to rely upon *Taylor* and the earlier decision in *Doe*. It noted:

> The situation of school children, compelled by state law to attend school, who are physically mistreated by School District employees, may not be dissimilar to that of children in foster homes mistreated by their foster parents. However, we prefer not to rest our decision again on an affirmative duty to protect such students in this situation because the *uncertainty of the law* in this respect may cause further delay.

Stoneking II 882 F.2d at 724 (emphasis added).

The Sixth Circuit and other courts of appeal have misread *DeShaney*, relying upon it as having decided an issue on which this Court explicitly expressed no opinion. This Court should grant certiorari to correct the misapplication of its holding in *DeShaney* and to eliminate confusion over the clearly established rights of foster children.

CONCLUSION

For all the above reasons, Petitioner prays that this Court grant certiorari to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Fourteenth Amendment, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

EUGENE D., a minor by and
through his mother and next
friend, Olivia D.,
Plaintiff,
v.
JOHN R. KARMAN, *et al.*,
Defendants.

ORDER

Defendants having moved for summary judgment on the grounds that there are no material issues of relevant fact and that it is entitled to summary judgment as a matter of law,

IT IS HEREBY OVERRULED.

Defendants' motion for summary judgment on the theory that they are entitled to qualified immunity as a matter of law is also OVERRULED.

This order is appealable insofar as it pertains to the motion for summary judgment based on qualified immunity.

Dated: February 25, 1987

CHARLES M. ALLEN
Charles M. Allen, Senior Judge

cc: Counsel of Record

CIVIL ACTION
C 84-1075-L(A)
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MEMORANDUM OPINION

This action is submitted to the Court on the motion of the defendants for summary judgment. For the reasons set out below, we will deny the motion.

The complaint was brought pursuant to 42 U.S.C. § 1983 alleging, in essence, deliberate indifference to serious medical needs of the plaintff. Eugene is a thirteen year old boy who, after suffering brain damage at eight months of age, was found to be a dependent child and placed in the legal custody of the Cabinet for Human Resources. He lived in foster homes in Louisville until December 1982. Defendants are social workers and their supervisors, all agents of the Kentucky Cabinet for Human Resources. The complaint alleges that the defendants failed to adequately train, monitor and review his physical condition, resulting in violation of his constitutional rights, danger to his life and irreparable injury to his physical condition. Liability is predicated upon the allegation that the defendants were deliberately indifferent to the serious medical needs of the plaintiff.

Extensive discovery has been taken in the case, and there are material issues of fact, including differing opinions of experts and factual circumstances that are subject to differing inferences. The motion must, therefore, be overruled on the question of whether or not there are material facts in issue.

Plaintiff has produced evidence on discovery to the effect that defendants placed Eugene D. in a foster home where the foster mother was nearing sixty years of age and not in the best of health. Simply feeding Eugene required several hours a day, and he also needed to be turned every four hours, needed frequent medical attention and needed physical therapy on a daily basis. Defendants allowed him to remain in the home, even though there were two other severely disabled children in the home, who also needed time-consuming care.

There is a further showing in the discovery depositions that defendants failed to respond to the complaints of various agencies concerning Eugene D.'s weight, lack of dental care and his hygiene. Also, there is evidence that defendants failed to get plaintiff into school, constituting deliberate indifference. Also, there was evidence that the defendants failed to adequately address plaintiff's very low body weight, and that defendants failed to obtain for plaintiff a wheel chair for two years after it was needed. This evidence is more than sufficient to create issues of fact and mandate overruling the motion for summary judgment.

Defendants also raise the question of qualified immunity in their motion for summary judgment. This is the same argument that was presented by motions to dismiss prior to answer herein. We rejected the argument by overruling the motions to dismiss on June 25, 1985. Defendants did not seek appellate review of our action, despite the fact that *Mitchell v. Forsyth*, ____ U.S. ____, 105 S.Ct. 2806 (1985) was decided a week prior to our order. The argument presented now utilizes the vehicle of a motion for summary judgment, but it is based solely on the state of the law at the relevant time, and it does not rely on factual development to state any new contention. Plaintiff notes the identity of argument, but has interposed no objection to the Court's reconsideration of the issue. Indeed, the plaintiff has joined in a motion to hold this case in abeyance pending appeal of the immunity issue, and on the strength of that, the Court has consented to continue generally the summary jury trial that was scheduled herein. While we reach the same conclusion that we reached when the question was presented by way of motions to dismiss, we will set forth our reasoning. It must be left to the appellate court to determine

whether defendants waived their right of appeal. *Kennedy v. City of Cleveland*, 797 F.2d 297 (6th Cir. 1986).

In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), the Supreme Court ruled that government officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." The court defined this qualified immunity defense in objective terms by holding that the objective reasonableness of the official's conduct is to be determined by reference to clearly established law. *Harlow*, p. 818. In order to determine what the clearly established law is, one must refer to the opinions of the Supreme Court, the circuit courts of appeals, and the local district court. *See Procunier v. Navarette*, 434 U.S. 555, 565 (1978).

The defendants contend that there was no clearly established case law with reference to the rights asserted by the plaintiff before May 1981 when the decision was rendered in the case of *Doe v. New York City Department of Social Services*, 649 F.2d 134 (2d Cir. 1981). The plaintiff countered by citing *Fitzke v. Shappell*, 468 F.2d 1072 (6th Cir. 1972), *Harper v. Coerr*, 544 F.2d 1121 (1st Cir. 1976) and most important of all, Estelle v. Gamble, 429 U.S. 97 (1976).

In *Estelle, supra*, the court held that a prisoner who is in the custody of a state has a constitutional right to be protected from deliberate indifference to his medical needs which results in physical harm to him. The "deliberate indifference" standard had been articulated previously by the circuit courts of appeal. *Martinez v. Mancusi*, 443 F.2d 921 (2d Cir. 1970). In *Fitzke v. Shappell, supra*, it was held that a person who had been arrested and was in police custody had stated a cause of action where the circumstances were clearly sufficient to indicate a need of medical attention for illness or injury and the denial of such aid. In that case, the complaint alleged that defendant was held for seventeen hours in the Eaton County Jail without necessary medical treatment during which period he was suffering from serious brain injury and was denied requested medical treatment. As stated by the court, the person who is in custody becomes both vulnerable and dependent upon the state to provide certain simple and basic

needs such as medical care. Where he cannot provide that medical care himself and it is denied, then he has a constitutional right which has been violated.

In *Williams v. Vincent*, 508 F.2d 541 (2d Cir. 1974), the court refused to foreclose an action where medical attention had been provided, but there was a dispute of fact as to whether there was merely a difference of professional judgment, or deliberate indifference that "caused an easier and less efficacious treatment to be consciously chosen." *See Williams* at p. 544. It is clear that during the period 1973 until 1982, it was well established that there was a constitutional right of person in custody to be free from harm resulting from deliberate indifference.

It has long been recognized that persons in state custody who have been convicted of no offense are entitled to treatment at least as favorable as that to which convicts are entitled. *See Jones v. Wittenberg*, 323 F.Supp. 93 (N.D. Ohio 1971). In that case, the court quoted a passage from Blackstone's *Commentary*, that one detained other than because of conviction of a criminal offense must not be subjected to any hardship not necessitated by the purpose of confinement itself. The Court holds that the deliberate indifference standard has not been limited to prisoners, and that reasonable persons in defendants' positions would have known that the conduct of which the plaintiff accuses them would violate clearly established statutory or constitutional rights.

Defendants' contention that they are entitled to qualified immunity because the decision in *Doe, supra* was not rendered until May of 1981 is without merit in light of the decisions previously cited by the Court. *Doe, supra*, was the first case under 42 U.S.C. § 1983 presenting the specific facts of deliberate indifference in state officials' supervision of a foster home, but it is clear from that opinion that the liability rested on cases such as *Estelle*, and did not in any way modify or amend the broad princples for which *Estelle, Martinez, Fitzke*, and *Williams* stand.

The Court realizes that there is a dispute of fact as to whether or not defendants' conduct merely amounted to a failure to provide the type of care that plaintiffs' experts would prefer, but such a dispute cannot be resolved pursuant to Fed.R. Civ.P. 56.

Where there is a mere difference in professional judgment, there is not liability under 42 U.S.C. § 1983. However, here there is a factual dispute as to whether or not there was deliberate indifference to the serious needs of a handicapped child in state custody. If plaintiff prevails on those claims, then deliberate indifference has been shown and liability can be imposed under 42 U.S.C. § 1983. We, therefore, overrule the motion of the defendants for summary judgment. An order in accordance with this opinion will be entered this day.

Dated: February 25, 1987

Charles M. Allen, Senior Judge

cc: Counsel of Record

RECOMMENDED FOR FULL TEXT PUBLICATION
See Sixth Circuit Rule 24

No. 87-5346

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EUGENE D., a minor, by and through his mother and next friend, OLIVIA D.,
Plaintiff-Appellee,
v.
JOHN R. KARMAN, JR., MARGERY TAYLOR CHAPLEAU, SHERRY HAYDEN BRUCE, MARY JOHNSTON BALLARD, MARCIA MELLER PUROL, PRUDA BIRD, ELLEN RECEVEUR WADE, and VICKY YOUNGMAN SCHWEICKHARDT,
Defendants-Appellants.
ON APPEAL from the United States District Court for the Western District of Kentucky

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Decided and Filed November 13, 1989

Before: MERRITT, Chief Judge; KENNEDY, Circuit Judge; and ENGEL, Senior Circuit Judge.*

ENGEL, Senior Circuit Judge, delivered the opinion of the court, in which KENNEDY, Circuit Judge, joined. MERRITT, Chief Judge, (pp. 23-30) delivered a separate dissenting opinion.

ENGEL, Senior Judge. In this civil rights action under 42 U.S.C. § 1983, defendants, who are various Kentucky social workers, appeal the district court's order denying their motion for summary judgment based on qualified immunity. Plaintiff, Eugene D., is a minor who claims that he came to harm while placed in a state-licensed foster home as a result of the social workers' deliberate indifference to his serious medical and developmental needs. The defendants contend that during a period from May,

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* The Honorable Albert J. Engel assumed senior status on October 1, 1989.

1974 until December, 1982, when Eugene was in the foster home, it was not clearly established that the Due Process Clause of the Fourteenth Amendment imposed upon them a duty to assume responsibility for his care. Because the district court improperly found that such a constitutionally imposed obligation was clearly established, we now reverse.

I.

Eugene D. was born on August 30, 1973. Some six months later, on February 6, 1974, his mother, Olivia D., took him in a comatose state to the Louisville General Hospital. The next day, Eugene was transferred to Kosair's Children's Hospital, where he remained until March 14, 1974, when he was discharged and sent to the Jewish Convalescent Home. It wsa later determined that sometime before his mother took him to the hospital, Eugene had sustained brain damage, apparently as the result of some form of trauma, which rendered him severely mentally retarded with spastic cerebral palsy. Eugene remains essentially blind, nonverbal and non-ambulatory. He is totally dependent on others for care, including his feeding and personal hygiene. Moreover, the damage to Eugene's brain causes him difficulty in swallowing and, as a result, simply feeding Eugene requires several hours a day. He also needs to be turned every four hours to prevent bedsores and to be given physical therapy on a daily basis.

The exact cause of the brain damage has not been established. The Jefferson County Metropolitan Social Services Division filed a petition alleging suspected abuse with the Juvenile Division of the Jefferson County Court, but Eugene was not found to have been abused by his mother. Instead, the court found him to be a "dependent child" pursuant to Ky. Rev. Stat. § 208.020, and committed him to the legal care, custody and control of a predecessor agency to the Kentucky Cabinet for Human Resources (KCHR).[1] Likewise, Eugene's underlying condition,

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[1]Eugene's exact status under Kentucky law is not clear from the record before us. It appears that custody over Eugene was "temporarily" placed with the KCHR throughout the relevant period. *See* Ky. Rev. Stat. § 208.20 (1964). There is no indication in the record that

which is indeed pitiable, is one which cannot be fairly charged to any of the defendants in this case.

Upon his release from the Jewish Convalescent Home on May 1, 1974, Eugene was placed by KCHR in the state-licensed foster home of Mrs. Blanche Smith, which is located in Jefferson County, Kentucky. Mrs. Smith, a sixty year old widow at the time, was also responsible for the care of her six year old grandson and a second handicapped foster child. Subsequent to Eugene's placement in the home, two additional severely handicapped children were placed by KCHR with Mrs. Smith. Like Eugene, all of the other three children placed in Mrs. Smith's home required significant care or attention. Eugene remained in Mrs. Smith's care for some eight and one half years, until December 6, 1982.

At different times during this eight-and-one-half-year period, six of the named defendants, all KCHR employees, were assigned as Eugene's caseworkers.[2] The remaining named defendants served in supervisory positions in the KCHR during the relevant

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Olivia D.'s parental rights were formally terminated at that time. *See* Ky. Rev. State. § 199.600 (1972).

[2]The named defendants who were Eugene's caseworkers are: defendant Mary Johnston Ballard from June, 1975 until October, 1976; defendant Vicky Youngman Schweickhardt from November, 1976 until October, 1977; defendant Marcia Miller Purol from October, 1977 until January 1981; Sue Chanilewski from February, 1981 until September 30, 1982; defendant Ellen Wade from September 30, 1982 until October 18, 1982; and defendant Pruda Bird from October 18, 1982 until December 6, 1982. Pursuant to a settlement agreement that was approved by the district court on October 14, 1986, all claims against Sue Chanilewski have been dismissed; accordingly, she is not a party to this appeal.

period.[3] Kentucky statutes and regulations defined defendants' responsibilities with respect to children placed in foster homes.[4]

The allegations at issue in this case concern the care and treatment Eugene received while in Mrs. Smith's foster home, which Eugene contends impaired his physical and developmental growth, shortened his life expectancy and caused him great pain and discomfort. Eugene has produced evidence which, viewed in the light most favorably to him, indicates that because of her inadequate training, her unwillingness or inability to follow directions regarding Eugene's care, and the demands for the care of the

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[3]Defendant Sherry Haydon Bruce supervised a number of caseworkers, including Mary Ballard while the latter handled Eugene's case. Defendant Ellen Wade served as the supervisor to each of Eugene's caseworkers from 1978 until his removal from the Smith home in December, 1982. Defendant Margery Chapleau was a social service supervisor in Jefferson County from March, 1982 until Eugene was removed from the Smith home. Chapleau was responsible for the supervision of a number of case workers, including those handling Eugene's case. Beginning in March, 1980, defendant John R. Karman was the Family Service District Manager with KCHR for the Jefferson County district.

[4]While the relevant statutes were amended several times during the period in question, it is clear that at all relevant times the KCHR was required at a minimum to "locate and plan for all [dependent] children" and to perform such "other services as may be deemed necessary for the welfare of children." Ky.Rev.Stat.Ann. § 199.460 (Baldwin 1988). In 1978, the statute was amended to require a medical examination of a child upon placement in a foster home, and mandatory annual examinations thereafter. Ky.Rev.Stat.Ann. § 199.463 (Baldwin 1988). The 1978 amendments also required the KCHR to promulgate regulations specifying the "method used to periodically review children placed in foster homes." Ky.Rev.Stat.Ann. § 199.465 (Baldwin 1988). *See also* Ky.Rev.Stat.Ann. § 208.010 *et seq.* (setting out additional responsibilities of the KCHR with regard to dependent children). Of course, whether defendants violated any of their duties imposed by statute or regulation is collateral to our initial inquiry whether there was a clearly established right to sue defendants under section 1983 for violations of the Fourteenth Amendment's Due Process Clause alleged here. *Cf. Davis v. Holly*, 835 F.2d 1175, 1179 (6th Cir. 1987).

other children placed in her home, Mrs. Smith was initially and became increasingly unable to care for Eugene. As a result, Eugene received a diet that was nutritionally inadequate, causing him to suffer from malnutrition, to lose weight and to fail to gain as much weight as might be expected of a child in his condition. It is also evident that he did not always receive the physical therapy he required. Although Eugene ordinarily attended school and kept numerous medical appointments, the proofs showed that during certain periods Mrs. Smith allowed him to miss school and failed to keep a number of medical appointments.

As early as 1976, KCHR social workers began to express concern regarding Mrs. Smith's ability to care for Eugene. Medical, educational and other personnel who provided treatment and services to Eugene shared those concerns. More important, at various times during the relevant period, they reported their concerns regarding Eugene's weight, hygiene, school attendance, and missed medical appointments to KCHR workers. Despite these reports over a six-year period, Eugene was not removed from Mrs. Smith's care until December, 1982.

In addition to this evidence of inaction of insufficient action despite mounting evidence that Eugene was at least receiving inadequate care, Eugene has introduced evidence regarding a number of particular incidents which he believes were ignored or improperly handled by the defendants. Perhaps the most significant of these involves Eugene's allegation that his caseworker failed to investigate the circumstances surrounding a broken leg which Eugene suffered in August, 1976. At the time, Mrs. Smith told the treating physician that the leg had been swollen for two days, presumably because of improper physical therapy administered by a baby-sitter. A radiologist who took an x-ray of the leg determined, however, that the break was at least ten days old. The hospital apparently informed Eugene's caseworker of the injury, but no investigation was undertaken by the KCHR.

On December 6, 1982, Eugene was removed from the case of Mrs. Smith and placed in another foster home. Eugene, who was nine years old at that time, weighted only 17 pounds, four ounces and was suffering from severe malnutrition. One defendant explained that the transfer was made because of concerns regarding

Mrs. Smith's failing health and her delay in following through on suggestions for improving Eugene's care made by KCHR. Eugene remained in the second foster home until January 13, 1984. He was then returned to the custody of his mother, Olivia D., for the first time since February 6, 1974. Olivia D, stated at her deposition, however, that she visited Eugene a few times while he was in the care of Mrs. Smith.

Eugene D., by and through his mother and next friend, Olivia D., brought this action under 42 U.S.C. — § 1983 in the United States District Court for the Western District of Kentucky against various named and unnamed employees of KCHR. Mrs. Smith, the foster mother, was not named as a defendant. The complaint, as later amended, alleged that the defendants had deprived Eugene of his liberty without due process of law, in violation of his rights under the Fourteenth Amendment, by failing properly to monitor and supervise his foster care placement. More specifically, the complaint alleged that the defendants acted with "deliberate indifference" to the serious medical needs of Eugene, by failing to protect him from bodily harm at the hands of Mrs. Smith of which they knew or reasonably should have known. The complaint further alleged that as a direct and proximate result of defendants' acts and omissions, Eugene suffered permanent physical, developmental, psychological and emotional damage. The relief sought in the complaint was compensatory and punitive damages from each individual defendant sued solely in his or her personal capacity.[5]

After extensive discovery, the district court considered defendants' motions for summary judgment, which were based in part upon claims of qualified immunity. The court denied the motions, holding that during the period from May, 1974 until December, 1982, it was clearly established "that there was a constitutional right of a person in custody to be free from harm resulting from deliberate indifference." Memorandum Opinion of February 25,

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[5]The complaint also set out two pendant state claims: general negligence on the part of the defendants and negligent compliance with statutory duties. These claims were not addressed below, and we do not consider them on appeal.

1987 at 5. The district court further found that the evidence introduced by Eugene created genuine issues of material fact regarding such a claim. In particular, the court noted a dispute as to whether defendants' conduct amounted to "deliberate indifference" or whether there was merely a difference in professional judgment between the experts for each side regarding what type of care should have been provided.

In reaching its conclusion regarding the immunity issue, the district court primarily relied on cases arising in an Eighth Amendment setting. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (holding that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' . . . proscribed by the Eighth Amendment."). *Accord Williams v. Vincent*, 508 F.2d 541, 544 (2d Cir. 1974) (a complaint based on inadequate medical treatment states a cause of action if it alleges conduct which "shocks the conscience," such as deliberate indifference by prison authorities to a prisoner's request for essential medical treatment); *Martinez v. Mancusi*, 443 F.2d 921, 923 (2d Cir. 1970) (a complaint claiming violation of Eighth Amendment by virtue of failure to provide medical care "must suggest the possibility of some conduct that 'shocks the conscience.' "). The district court reasoned that such cases provide support for Eugene's claim because an individual in custody who has been convicted of no offense is entitled to treatment at least as favorable as that to which convicts are entitled. Memorandum Opinion at 6 (citing *Jones v. Wittenberg*, 323 F. Supp. 93 (N.D. Ohio 1971)).

In addition, the district court relied upon two cases which at least in part involved something other than a violation of a plaintiff's right to be free from cruel and unusual punishment. The district court relied on our court's opinion in *Fitzke v. Shappell*, 468 F.2d 1072 (6th Cir. 1972), which held that the concept of due process mandates that a pretrial detainee be given necessary medical treatment where circumstances are such that it is clear that such treatment is necessary. The district court also cited *Harper v. Cserr*, 544 F.2d 1121 (1st Cir. 1976), in which the Court of Appeals for the First Circuit held that a voluntarily committed mental patient could be so helpless as to be considered

a de facto prisoner, thus entitling her to bring a section 1983 claim alleging violations of the Eighth Amendment or possibly even the Due Process Clause of the Fourteenth Amendment when those caring for her act with "wanton callousness." 544 F.2d at 1124. The First Circuit went on to hold, however, that such a right could not reasonably have been foreseen by the defendant, and that plaintiff would therefore not be allowed to recover damages absent a "showing of wanton neglect tantamount to actual malice." 544 F.2d at 1125.

Consistent with its conclusion that the cases arising in these different settings served to establish the constitutional right alleged by Eugene, the district court rejected defendants' contention that, at the very earliest, the right alleged by Eugene was clearly established by *Doe v. New York City Dep't of Social Services*, 649 F.2d 134 (2d Cir. 1981), which was decided on May 13, 1981. As will be discussed more fully below, the plaintiff in that section 1983 action claimed that the New York City Department of Social Services ignored clear evidence that she was being sexually abused by her foster father. Drawing an analogy to *Estelle v. Gamble, supra*, the Second Circuit held that the plaintiff could maintain her action if agency officials were deliberately indifferent to a known injury or risk to the foster child. 649 F.2d at 145.

Defendants filed this interlocutory appeal on the immunity issue. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *Kennedy v. City of Cleveland*, 797 F.2d 297 (6th Cir. 1986). We now reverse.

II.

The Supreme Court has made clear that "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness of the action' . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 107 S.Ct. 3034, 3038 (1987) (citing

Harlow v. Fitzgerald, 457 U.S. 800 (1982)). This standard reflects a careful balance between two conflicting concerns:

> In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees . . . At the same time, however, it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty — at a cost not only to the defendant officials, but to society as a whole. These social costs include expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties."

Harlow, 457 F.2d at 814 (citations and footnote omitted); *Cf. Anderson*, 107 S. Ct. at 3038.

In *Anderson v. Creighton, supra*, the Supreme Court elaborated on the level of generality at which legal rights are "clearly established." The Court made clear that for a right to be clearly established it must have been articulated with a significant degree of particularity:

> The operation of this standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. . . . It should not be surprising, therefore, that our cases establish

> that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

107 S. Ct. at 3038-39. This particularity requirement does not mean that the very action in question must have been held unlawful; it does mean, however, that in light of the pre-existing law, the illegality of the action must be apparent. *Id.* at 3039.

The issue of qualified immunity is a question of law for the district court; thus, on appeal we consider the issue de novo. In deciding whether the law was clearly established, we look to federal constitutional, statutory or case law existing at the time." *Dominique v. Telb,* 831 F.2d 673, 677 (6th Cir. 1987). When the focus is on decisional law, we examine initially, and most importantly, the decisions of the Supreme Court and the courts of this circuit. *Poe v. Haydon,* 853 F.2d 418, 424 (6th Cir. 1988).[6] If case law from these sources is unavailable, we may also look for guidance to the cases from other circuits. *Id.* We recognize, however, that a single recent case from the court of appeals of another circuit is hardly sufficient to make the law "clearly established" in this circuit. See *Hensley v. Wilson,* 850 F.2d 269, 275 (6th Cir. 1988); *Davis v. Holly,* 835 F.2d at 1182.

III.

The starting point of our analysis is a review of Eugene's claims against the defendants. Because his complaint is drafted in broad and sweeping terms, it is difficult to ascertain exactly what acts were allegedly committed by which defendant. Suffice it to say, however, that Eugene alleges that KCHR personnel ignored clear evidence that (1) his weight was dangerously low; (2) his hygiene level was unacceptable; (3) he was receiving inadequate or inappropriate physical therapy; (4) he regularly missed medical

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[6]We may also look to the decisions of the highest state court in the state where the case arose. *Robinson v. Bibb,* 840 F.2d 349, 351 (6th Cir. 1988).

appointments; (5) his school attendance was poor; and (6) he did not receive adequate medical equipment for the treatment of his medical conditions. Eugene also alleges that Eugene's placement in Mrs. Smith's foster home was made without adequate screening or training of the foster mother and without adequate training of the social workers assigned to his case. Based upon these allegations, Eugene asserts that defendants were deliberately indifferent to his needs and, as a result, deprived him of "his right to be free from bodily harm and unjustified intrusions upon his personal security and safety as guaranteed by the due process clause of the Fourteenth Amendment."[7] Amended Complaint at 18.

In its Memorandum Opinion, the district court held that throughout the relevant time period there was a clearly established "constitutional right of a person in [state] custody to be free from harm resulting from deliberate indifference" on the part of that person's custodians. We find, however, that the "right" the district court found to have been clearly established was not the particularized right required by *Anderson v. Creighton, supra,* and, therefore, was not sufficient basis for a denial of the defendants' motion for summary judgment. The "right" that is truly at issue here, stated in its most general form, is the right of a foster child to be protected from bodily harm at the hands of a state-licensed foster parent.

We agree with the parties that the constitutional source of any such affirmative obligation to protect Eugene is the substantive as contrasted to the procedural component of the Due Process Clause of the Fourteenth Amendment.[8] Because the Due Process

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[7]Thus, the complaint does not assert that any overt affirmative action by any individual defendant was directly abusive of the child or resulted in the exacerbation of his underlying condition. *Cf. DeShaney v. Winnebago County Dep't of Social Services,* 109 S. Ct. 998, 1006 n.8 (1989) (citing cases). *See also Rochin v. California,* 342 U.S. 165 (1952).

[8]Eugene's complaint does not allege that any Kentucky statute gave his an "entitlement" to receive protective services in accordance with the terms of the statute, an entitlement which would enjoy due process

Clause simply provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law," Eugene looks to decisional law in arguing that the particular right alleged to have been violated was clearly established throughout the relevant period.

Eugene does not claim that such an affirmative obligation to protect foster children was clearly established throughout the period from May, 1974 until December, 1982 by virtue of the express holding of any specific opinion of the Supreme Court or of our circuit; such a claim would certainly fail. In an opinion issued on February 22, 1989, *DeShaney v. Winnebago County Dep't of Social Services,* 109 S. Ct. at 1006 n.9, the Supreme Court made clear that it has not yet addressed whether the placement by the State of a child in a foster home operated by its agents, gives rise to an affirmative duty to protect that child. Likewise, our court has not yet addressed the issue, nor need we do so today for the complaint seeks only monetary damages from the defendants.

Eugene does assert, however, that the courts of other circuits held during the period in question that children have a constitutionally protected right to be free from harm while in state foster care. He argues, in part, that these cases support the district court's conclusion that such a right was clearly established during the period at issue. The earliest such case cited by Eugene is *Brooks v. Richardson,* 478 F. Supp. 793 (S.D.N.Y. 1979). In that case, plaintiff's children were placed in the custody of the Commissioner of Social Services and Brookline Home for Children (BHC), a non-profit corporation which was under contract from the Commissioner to place children in certified foster homes. Denying defendant BHC's motion to dismiss the complaint, the district court held that plaintiff's allegations that the children had been abused and neglected while under the control of BHC were sufficient to state a federal cause of action. The district court stated the governing principle of law as follows: "A child who is in the custody of the State and placed in foster care has a constitutional right to at least humane custodial care." *Id.* at 795.

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protection against state deprivation under *Board of Regents v. Roth,* 408 U.S. 564 (1972).

Eugene also cites *Doe v. New York City Dep't of Social Services, supra,* where the Second Circuit reversed a jury verdict that the agency responsible for placing the plaintiff in a foster home and supervising her care was not liable for the plaintiff's injuries where evidence showed that the agency had failed to act on its knowledge that plaintiff's foster father was abusing her. In reaching its decision, the court explained: "When individuals are placed in custody or under the care of the government, their governmental custodians are sometimes charged with affirmative duties, the nonfeasance of which may violate the constitution." *Id.* at 141. The court further explained that section 1983 liability could be imposed on such defendants "if they, or in the case of an agency, its top supervisory personnel, exhibited deliberate indifference to a known injury, a known risk, or a specific duty, and their failure to perform the duty or act to ameliorate the risk or injury was a proximate cause of plaintiff's deprivation of rights under the Constitution." *Id.* at 145.

Of course, *Doe v. New York City Dep't of Social Services,* which was decided on May 13, 1981, near the end of the period in question, would only put defendants on notice, under an objective standard, of such constitutionally imposed obligations from that time forward. As noted above, however, our court will not be easily swayed by the decisions of circuit and district courts other than our own when determining whether a constitutional right has been clearly established in this circuit. *See, e.g., Hensley v. Wilson,* 850 F.2d at 275; *Davis v. Holly,* 835 F.2d at 1182. Here, only a single circuit court and a single district court, both outside of our jurisdiction, had recognized the right in question during the time period that Eugene's rights were allegedly violated. *Harlow's* "objective legal reasonableness" test does not require state officials to know and to follow the most advanced state of the law as established by a remote court of the land. Accordingly, we are convinced that these cases alone do not, as a matter of law, clearly establish in our circuit, during the relevant time period, the

constitutionally imposed affirmative obligations Eugene claims are at issue in this case.[9]

In addition to arguing that decisions such as *Doe* and *Brooks*, which arose in the foster care setting, clearly established the right in question, Eugene claims that decisions involving incarceration and involuntary institutionalization also served to make apparent the unlawfulness of defendants' conduct throughout the relevant time period. Indeed, Eugene asserts that it was clearly established throughout the relevant period that the State has an obligation to provide "all those involuntarily placed in a custodial environment with safe living conditions and protection from harm." In making this argument, Eugene contends that this case involves the deprivation of his "historic" liberty interest in "free[dom] from . . . unjustified intrusions on personal security." *Ingraham v. Wright*, 430 U.S. 651, 672-73 (1977) (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). He further claims that it was clearly established throughout the relevant period that this liberty interest is not extinguished by lawful confinement in state custody. Thus he concludes the State owes all of those in custody some duty of care and protection. In making this argument, Eugene presumably relies on the language in *Anderson v. Creighton* which indicates that "the very action in question" need not have been held unlawful for the law to be clearly established. 107 S. Ct. at 3039. As described above, the district court essentially adopted this analysis in its Memorandum Opinion.

In explaining the decisional basis for this "clearly established" affirmative obligation which is constitutionally imposed on state custodians, Eugene points to Eighth Amendment decisions which impose upon the State affirmative duties of care and protection with respect to certain individuals. In particular, he relies on

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[9]While we do not consider the question of whether the right alleged by Eugene is "clearly established" as of the date of this opinion, we note that the Second Circuit's analysis has been adopted by courts of other circuits. *See, e.g., Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987); *B.H., C.H. J.E. and C.Z. v. Johnson*, No. 88 C 5599 (N.D. Ill. May 30, 1989). As noted above, the Supreme court has not yet addressed this question. *See DeShaney*, 109. S. Ct. at 1006 n.9.

Estelle v. Gamble, supra, where the Supreme Court recognized that the Eighth Amendment, as applied to the States through the Due Process Clause, imposes liability on prison officials when they are deliberately indifferent to the medical needs of prisoners. In that case the Court reasoned that "it is [only] just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself." *Estelle,* 429 U.S. at 104 (quoting *Spicer v. Williamson,* 191 N.C. 487, 490 (1926)). Eugene also points out that a number of circuits, including our own, had recognized in opinions decided before or during the relevant period that inmates could not be deprived of necessary medical care and treatment. *See, e.g., Westlake v. Lucas,* 537 F.2d 857, 860 (6th Cir. 1976); *Martinez v. Mancusi, supra.*

Eugene also relies on decisions in which some courts, including our own, have recognized that the substantive component of the Due Process Clause, independent of the prohibitions of the Eighth Amendment, imposes upon the State similar affirmative duties of care and protection of pretrial detainees. *See, e.g., Fitzke v. Shappell, supra.*

Finally, Eugene points to decisions holding that the substantive component of the Due Process Clause imposes certain obligations upon the State when it places individuals in nonpenal institutions. *See, e.g., Youngberg v. Romeo,* 457 U.S. 307 (1982); *New York State Ass'n for Retarded Citizens, Inc. v. Rockefeller,* 357 F. Supp. 752 (E.D.N.Y. 1973). In *Youngberg,* the Supreme Court held that the substantive component of Fourteenth Amendment's Due Process Clause requires the State to provide involuntarily committed mental patients with such services as are necessary to ensure their "reasonable safety" from themselves and others. The Court explained "[i]f it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional [under the Due Process Clause] to confine the involuntarily committed — who may not be punished at all — in unsafe conditions." 457 U.S. at 315-16.

As the Supreme Court's recent decision, *DeShaney v. Winnebago County Dep't of Social Services, supra,* makes clear, the cases relied upon by Eugene can be read to support his assertion

that the Due Process Clause of the Fourteenth Amendment imposes affirmative duties on the State whenever it takes an individual into its custody. In that case, the guardian ad litem of a child who had been beaten by his father brought a section 1983 action against social workers who had received complaints that the child was being abused by his father but had not removed him from his father's custody. The Court held that defendants' failure to provide the child with adequate protection against his father's violence did not violate the child's rights under the substantive component of the Due Process Clause because the State has no affirmative obligation to protect individuals who are not in state custody. 109 S. Ct. at 1006.

In reaching its decision, the Court noted that *Estelle* and *Youngberg*, "taken together," stand for "the proposition that when the State takes a person into its custody and holds him there against his will the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney*, 109 S. Ct. at 1005 (citing *Youngberg*, 457 U.S. at 317). The Court explained "[t]he rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs — *e.g.*, food, clothing, shelter, medical care, and reasonable safety — it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." 109 S. Ct. at 1005-06.

Of course, the Supreme Court's explicit statement in *DeShaney* cannot be relied upon by Eugene to establish such obligations during a period ending some six years earlier. Moreover, we cannot allow hindsight to control our analysis; the gloss that *DeShaney* put on the cases cited by Eugene was not available to the defendants in this case during the relevant period. Instead, we must determine whether the cases cited by Eugene, decided before or during the relevant period, clearly established the legal rules upon which he bases his claim.

We find that those cases did not clearly establish the Fourteenth Amendment violations alleged in this case. Assuming, but expressly not deciding, that nonpenal involuntary institutionaliza-

tion is most similar to the situation involved in this case, and thus most likely to advise social workers of such constitutionally imposed obligations, we begin our analysis of this inquiry there. The leading case in that area is *Youngberg v. Romeo, supra*, which leaves no doubt that the substantive component of the Fourteenth Amendment's Due Process Clause imposes certain obligations upon the State with respect to involuntarily committed mental patients. We are persuaded, however, that in light of *Youngberg* and the similar cases cited by Eugene, "[t]he contours of the right" alleged by Eugene were not "sufficiently clear that a reasonable official would understand that what he [wa]s doing violate[d] that right." *Anderson v. Creighton*, 107 S. Ct. at 3039. As noted above, the rationale underlying the affirmative duties imposed in *Youngberg* and *Estelle* is that by taking an individual into custody, the State renders him unable to care for himself. This helplessness arises because the State has removed and isolated the individual from the community and placed him under direct control of the institutional authorities.

By contrast, a child placed in foster care is at least arguably not in custody in the sense *Youngberg*. Foster care is designed to provide an environment as close to the home environment as possible under the circumstances: the foster child lives in the community, attends school, and is seen by doctors. Moreover, and as a direct result of this situation, the control the State may exercise over the child and thus the protection it may provide him with is diminished. As the Second Circuit explained in *Doe v. New York City Dep't of Social Services:*

> There is a closer and firmer line of authority running from superiors and subordinates within an institution than exists in the foster care context, particularly in respect of the relationship between agency personnel and the foster parent. Institutional administrators can readily call in subordinates for consultation. They can give strict orders with reasonable assurance that their mandates will be followed, and as added insurance other employees stationed in proximity of subordinates to whom orders are directed may be instructed to monitor compliance.

> By contrast [the agency responsible for supervising the foster child] had to rely upon occasional visits for its information gathering, and its relationship to the foster family was less unequivocally hierarchical than is the case with prison guards and a warden . . .
>
> . . . the agency felt constrained to respect the foster family's autonomy and integrity and pressured to minimize intrusiveness, given its goal of approximating a normal family environment for foster children.

649 F.2d at 142. Of course, in *Doe* the Second Circuit held that the "deliberate indifference" standard set out in *Estelle* applied in the foster care as well as the institutional setting, and reasoned that because of these differences courts should be less willing to infer the requisite state of mind for a constitutional violation on the part of a state custodian in the former setting than the latter. *Id.* Yet, these differences also raise serious questions as to whether foster care placement is sufficiently analogous to institutionalization so that a reasonable official would understand that, as a matter of law, the Fourteenth Amendment's Due Process Clause imposed similar affirmative obligations upon him or her. *Cf. DeShaney,* 109 S. Ct. at 1006 n.9.

At some later date our circuit or the Supreme Court may definitively decide whether the placement of a child in a state-licensed foster home which is supervised by state agents is sufficiently analogous to institutionalization to give rise to a constitutionally imposed affirmative duty to protect. However, we are convinced that the differences are sufficient to require us to hold, under an objective legal reasonableness standard, that it was not clearly established at any time during the relevant period that such an obligation existed by virtue of the Constitution.[10] It would

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[10]We note that the Seventh Circuit has reached a similar conclusion in an appeal covering a later time period. In *Doe v. Bobbitt,* 881 F.2d 510 (7th Cir. 1989), the court concluded that the Second Circuit's "novel analogy between incarceration and placement in a foster home" was not sufficient to have clearly established in 1984 that the "public official who places a child at risk of harm from private individuals in a foster home violated that child's constitutional rights." *Id.* at 512.

therefore be improper to impose personal liability on these defendants on that basis.

For similar reasons we believe that the cases addressing a State's obligations in the Eighth Amendment setting do not clearly establish that defendants owed Eugene constitutionally imposed duties. We reach this conclusion even though some courts, relying upon *Estelle* and other cases arising in the Eighth Amendment setting, have determined that the Fourteenth Amendment's Due Process Clause imposes analogous affirmative obligations on the State when it places an individual in foster care. *See, e.g., Doe v. New York City Dep't of Social Services, supra.* Those cases involved the substantive issue of whether such a constitutional duty existed at all. The instant case, by contrast, involves the distinct question of whether such a principle of law was clearly established. We may not impose personal liability upon state social workers because they failed to anticipate that principles of law developed in other distinct contexts would be applied to them, for to do so would be contrary to the admonition in *Anderson v. Creighton,* 107 S. Ct. at 3039, that we should not allow plaintiffs to convert "the rule of qualified immunity into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights."

We therefore conclude that the district court erred in holding that qualified immunity did not apply to the defendants in this case. While the cases cited by the court below and by Eugene on appeal viewed together evidence significant developments in the law in this area during the relevant time period, *see, e.g., Youngberg,* 457 U.S. at 314, they are in our view, whether taken individually or together, insufficient to place defendants on notice that their conduct violated clearly established law. Therefore, we believe that subjecting these defendants to personal liability for the tragic circumstances of this case would simply upset the balance that the Supreme Court has directed us to strike between the interests in vindication of citizens' constitutional rights and public officials effective performance of their duties. Accordingly, we REVERSE and REMAND with directions to grant defenants' motions for summary judgment on the basis of qualified immunity.

MERRITT, Chief Judge, dissenting. This case is about the protection the due process clause offers to children who are wards of the state, a case in which the majority has held that officials have no personal liability for allowing such wards to be physically abused by foster parents. The Court holds that the law which has developed under the due process clause concerning wards of the state is so unclear and unformed that officials should not reasonably understand that they have a legal duty to put a stop to known and ongoing physical abuse. The Court refused to say under due process that state officials have even the most minimal legal duties to protect such wards from physical harm. I disagree with the Court's understanding of the law, its history and development, and its application to this case.

The majority denies Eugene D. access to federal court on the basis of two readily apparent errors. First, it provides an inadequate statement of the right asserted here. Eugene D. does not assert merely "the right of a foster child to be protected from bodily harm at the hands of a state-licensed foster parent." *Op.* at 14. The state's role here is not limited to licensure of the foster home. In addition, the state took Eugene D. out of his mother's custody, apparently in the context of an abuse proceeding, assumed custody itself, and then bestowed custody on a foster parent of its sole selection. No one — not Eugene, not his mother, not another relative or a public-minded citizen — could transfer Eugene from his placement; that could be done only by the state. The right asserted here is the right not to be legally constrained to remain in the custody of a foster parent who, as state officials knew, continually and repeatedly provided dangerously inadequate care.

A violation of this right is proven adequately for this preliminary stage of the proceeding in this case. According to the record, the defendants, state social workers, placed the plaintiff child with a foster parent. The foster parent failed to provide decent food, clothing, medical attention and education. At age 9 the child weighed only 17 pounds and had a broken leg which had gone uncared for. The child was not bathed and was kept in filthy conditions and clothing. The defendants had knowledge of the

conditions in which the child was made to exist, and they did nothing to correct the situation for many years.

Second, the majority errs when it determines that the defendants have qualified immunity from a § 1983 action asserting a right not to be committed to the care of a foster parent who, as the defendants knew, exposed the plaintiff to continual and severe danger and suffering. Here, the majority overstates the novelty of the question before it, and gives a rigid and wooden reading to the Supreme Court precedents on qualified immunity.

The last half of the Twentieth Century is hardly the first time this type of question before us today has arisen in our legal system. The rights of helpless children who are wards of the state has a history going back to the Magna Carta and beyond. The feudal "law of the land" of the Twelfth Century gave children upon the death of their parents a cause of action for abuse by a liege lord, the feudal equivalent of a state official who held office under the authority of the King. The feudal law created a series of causes of action, beginning with the writ of *mort d'ancestor* in 1176, which the child had against a lord or other persons for the theft of inheritance and other forms of abuse. *See* I Pollack & Maitland, *History of English Law,* Bk. II, Chap. I, § 8, at 318-29 (Lawyers Literary Club ed. (1959)); and W.L. Warren, *Henry II* 342-48 (1977). In addition, four sections of the Magna Carta of 1215 chapters 3, 4, 5, and 37 treated the grievances of the Barons against King John for his abuse of the rights of children in connection with wardship. *See* McKechnie, *Magna Carta* 203-12, 367-69 (2d ed. 1914); Ganshoff, *Feudalism* 127-28 (English ed. 1952). Thus, the law of England in 1215 protected wards against abuse by the state, both through the newly developing common law writs and by the constitutional law promulgated in the Magna Carta.

Should the "due process of law" of the Twentieth Century for the protection of helpless children from official abuse be less attentive in its protection than the "law of the land" in the time of Glanville, Henry II and the Magna Carta? If the law against such official child abuse was sufficiently clear then to have been declared as the law of the realm at Runnymede, "the contours of the right must be sufficiently clear [to] a reasonable official"

today to provide minimal protection, *Anderson v. Creighton*, 107 S. Ct. 3034, 3039 (1978). One need not be a scholar of the Magna Carta or the law in the time of Henry II to see the irony in saying that the law of the land against official child abuse was settled in the formative years of our legal system eight centuries ago, but as the system has advanced, the protection of children in wardship to the state has regressed. The law is surely capable of more continuity and more humanity than that.

Our court has held that the defendant officials are immune in this suit, freeing them of any legal responsibility whatsoever for the welfare of the child they took into custody and placed in the foster home. The major premise of the Court's opinion by which this result is reached is certainly correct as far as it goes: neither the Supreme Court nor our Court has yet specifically ruled that foster children generally, or foster children held in custody under Ohio's particular foster care system, are protected by the due process clause. There is no case in the Supreme Court or in our Court on foster care which specifically establishes "deliberate indifference" or "reckless disregard" or "gross negligence" or any other particular set of words as the standard of a ward's substantive due process rights.

But the reason that neither of the two Courts has yet reached such a decision is simple: we have not had a case that presented the issue of care in the specific context of foster care. Thus, there are no cases which specifically say that foster children are *not* protected under substantive due process. The cases from the two Courts have not expressly decided the issue either way.

Counsel for plaintiff at page 27 of her brief points out concisely the fundamental error in the position of the defendants which our Court has now adopted:

> In essence, defendants [and the court] argue that unless the factual situations in the two cases are identical, the holding of one case can never be applied to the other. Of course, no such requirement exists. Instead courts look to the principles underlying a holding to determine its relevance to subsequent cases.

Our Court has erred by asking the wrong question and therefore made the case turn on the wrong major premise. Instead of asking a narrow question — is there a specific or identical case on foster care? — the Court should have asked: is there a principle of substantive due process well established in our legal conscience that covers a person held in state custody, including a foster care child? The answer to that question is yes.

In *DeShaney v. Winnebago County Dep't of Social Services,* 109. S. Ct. 998, 1005-06 (1989), the Supreme court in dicta said in a foster care case that it had previously found in our legal conscience and declared a principle of reciprocity which covers the subject:

> When the state takes a person into its custody and holds him there against his will the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.

The Court explained the moral basis of this principle:

> The rationale for this principle is simple enough: when the state by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs — *e.g.,* food, clothing, shelter, medical care and reasonable safety — it transgresses the substantive limits on state action set by the eighth amendment and the due process clause.

The plaintiff argues that this fundamental master principle is applicable to wards of the state placed with foster parents, and I agree.

There are many cases respecting mental patients, pretrial detainees, prisoners, and juvenile delinquents which establish the principle that state officials may not remain completely indifferent to the health and safety of persons detained in state custody. The principle applies not only to prisoners under the Eighth Amendment, *Estelle v. Gamble,* 429 U.S. 97 (1976), and arrestees under due process, *Fitzke v. Shappell,* 468 F.2d 1072 (6th Cir. 1972), but also to mental patients, *Youngberg v. Romeo,* 457 U.S. 307,

315-16 (1982) ("if it is cruel and unusual to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed — who may not be punished at all — in unsafe conditions"). As the majority acknowledges, the Second Circuit has applied the same principle to foster care. *Doe v. New York City Dep't of Social Services,* 649 F.2d 134 (1981). Neither the majority nor I find any appellate case, other than the instant case, which rejects the principle in the context of foster care.

Furthermore, no court before today has been convinced that, simply because the state chooses to place a helpless child in a foster home rather than in a state-operated institution, and persists in holding him to that custody despite ongoing harm, the concept of fundamental decency and reasonable care expressed in *Youngberg* has no application. Indeed, the Supreme Court suggested in *Youngberg* that mental patients are not confined for punishment's sake and therefore "are entitled to *more* considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Youngberg,* 457 U.S. at 322 (emphasis added). An irony of our Court's decision in the instant case is that, because the plaintiff is a helpless child placed in foster care through no fault of his own, rather than an adult felon, he is not entitled even to minimal due process protection. Such a result is not only inhumane but inconsistent with the rationale of the applicable precedents.

In order to meet the test of "law" for purposes of qualified immunity "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson,* 107 S. Ct. at 3039. The Supreme Court could have defined "clearly established" in the immunity context as the majority in this case has defined it, to mean "so clearly declared in existing case law that no court, advocate or legal scholar could question its existence." But the Supreme Court did not so define "clearly established." Instead, the Supreme Court's test asks us whether the right asserted is so clear that reasonable officials — in this as in most cases, non-lawyer officials — would understand their actions to violate that right.

We are to look to the legal conscience of state officials, not to the cold pages of Shepard's or the Harvard Law Review.

With our case thus placed in the proper context, it is quite surprising to hear that officials have no duty to take reasonable steps to put a stop to continuous and unnecessary suffering caused by their actions or no obligation to give reasonable aid to those they have taken into their care, or both. Here the right arises from both the duty not to cause unnecessary suffering to a helpless child and the obligation to give aid to children under official control. The history of wardship and the recent precedents discussed above, as well as clear moral principles, make the "contours of the right" clear enough to put reasonable officials on notice.

The Court leads itself into today's erroneous ruling by taking an inflexible positivist position. It takes the view that law consists of the specific commands of the sovereign and nothing more[1] and that, since neither the Supreme Court nor the Sixth Circuit has ruled on a foster care case, there is no law on the subject. The Court fails to take into account that our law is also found in social contract, in principles of morality generally accepted by our people. The principle that children who are wards of the state deserve special protection describes an objective moral and legal reality. Had the inflexible positivist position stated in the majority opinion governed at the Nuremberg trials, those responsible for the atrocities in the gas chambers would have had no legal liability for their conduct. The Court would have said that, in the

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[1]The classic statement of the positivist position is found in the statement of Justice Holmes:

> If you want to know the law and nothing else, you must look at it as a bad man who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.
>
> . . . .
>
> I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.

Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 459-61 (1897).

absence of a statute or case precedent directly on point, the law was too unclear to impose liability.

I do not find in *Anderson v. Creighton* or in previous official immunity cases an inflexible positivist legal ethic which excludes consideration of history or the legal and moral principles developed over times in analogous cases. I see no reason to blind ourselves to the moral reality that condemns the conduct alleged here, or to feel compelled to distinguish numerous analogous precedents which would, to the legal conscience of a reasonable official, be directly relevant. We should not make our decision turn purely on the question of whether there is an identical case previously decided by the Supreme Court. Accordingly, I respectfully dissent.

No. 87-5346

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EUGENE D., a minor, by and through his mother and next friend, Olivia D.,
Plaintiff-Appellee,

vs.

JOHN KARMAN, Social Service Manager, Kentucky Cabinet for Human Resources, et al.,
Defendants-Appellants

ORDER

BEFORE: MERRITT, Chief Judge; KENNEDY, Circuit Judge; and ENGEL, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Merritt adheres to his dissent.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

Filed January 22, 1990

No. 84-1975L (A)

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUSIVILLE

EUGENE D., a minor, by and through his mother and next friend, Olivia D.,
Plaintiff,

vs.

JOHN R. KARMAN, JR., Social Service Manager, Kentucky Cabinet for Human Resources, Department for Social Services, individually; MARGERY TAYLOR COMBS CHAPLEAU, Social Service Supervisor, Kentucky Cabinet for Human Resources, Department for Social Services, individually; ELLEN SISTI WADE, Field Office Supervisor, Kentucky Cabinet for Human Resources, Department for Social Services, individually; SHERRY HAYDON, BRUCE, Foster Care Specialist, Kentucky Cabinet for Human Resources, Department for Social Services, individually; MARY JOHNSON BALLARD, Social Worker, Kentucky Cabinet for Human Resources, Department for Social Services, individually; VERNA C. YOUNGMAN SCHWEICKHARDT, Social Worker, Kentucky Cabinet for Human Resources, Department for Social Services, individually; MARCIA MILLER PUROL, Social Worker, Kentucky Cabinet for Human Resources, Department for Social Services, individually; SUSAN M. CHMILEWSKI, Social Worker, Kentucky Cabinet for Human Resources, Department for Social Services, individually; PRUDA STEWART BIRD, Social Worker, Kentucky Cabinet for Human Resources, individually; and DOES One through Fifty and their successors in office,
Defendants.

AMENDED COMPLAINT

I. INTRODUCTION

1. This is a civil rights action for damages. Plaintiff is an eleven-year old severely mentally and physically handicapped child who entered foster care under the legal custody, care and

control of the Kentucky Department of Human Resources now the Kentucky Cabinet for Human Resources (hereinafter KCHR) in 1974 at the age of nine months. Plaintiff was placed by KCHR in a state-licensed foster care home where he remained for eight years during which time he was subjected to prolonged and serious physical, psychological and emotional neglect and abuse. Plaintiff was removed from this foster home in 1982 at the age of nine at which time he weighed only 17 pounds, four ounces and was suffering from extreme malnutrition. Plaintiff alleges that defendants failed to properly monitor and supervise his foster care placement and protect him from harm in violation of his rights under the due process clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. Section 1983 and the laws and regulations of the Commonwealth of Kentucky.

II. JURISDICTION

2. Jurisdiction of this court is invoked pursuant to 28 U.S.C. Sections 1331(a) and 1343(3) and (4) to redress deprivations of rights, privileges and immunities secured by the laws and Constitution of the United States, specifically, the Fourteenth Amendment to the United States Constitution and 42 U.S.C. Section 1983. Plaintiff further invokes the pendant jurisdiction of this Court to consider claims arising under state law.

III. PARTIES

A. Plaintiff

3. Plaintiff EUGENE D. is a minor child and citizen of the United States and the Commonwealth of Kentucky who currently resides with his natural mother in Jefferson County, Kentucky. During the period covered by this complaint, EUGENE was committed to the legal custody, control and care of KCHR and was placed by KCHR in state-licensed foster care homes in Kentucky. He brings this action by and through his mother and next friend, Olivia D.

B. Defendants

4. Defendant JOHN R. KARMAN, JR. is and since approximately 1980 has been a Social Service Manager of KCHR. As such, defendant KARMAN is and was responsible for, *inter alia*, formulating, approving, and implementing policies and decisions affecting foster children within the jurisdiction and legal custody of KCHR, and for training, directing and controlling all supervisory personnel, social workers and other direct service personnel under him, including defendants CHAPLEAU, WADE, BRUCE, BALLARD, PUROL, SCHWEICKHARDT, CHMILEWSKI, and BIRD. Defendant KARMAN also is and was responsible for the approval of all foster care agreements between foster care providers and KCHR, including agreements for permanent substitute foster care. Defendant KARMAN further is and was responsible for overseeing the investigation of all complaints of abuse, neglect or otherwise deficient care being provided to foster children committed to KCHR and in state licensed foster homes in Jefferson County.

5. Defendant MARGERY TAYLOR COMBS CHAPLEAU is and, since March 1982, has been a Social Service Supervisor in the Louisville office of KCHR. As such, defendant TAYLOR is and was responsible for implementing KCHR policies, rules and regulations affecting foster children under the jurisdiction and legal custody of KCHR and for directing, controlling and supervising all subordinates under her. During part of the time relevant hereto, including from March 1982 through December 1982, defendant CHAPLEAU was responsible for supervising defendants WADE, CHMILEWSKI and BIRD. During this time defendant CHAPLEAU was directly responsible, along with defendants WADE, CHMILEWSKI and BIRD, for coordinating services provided to plaintiff, monitoring and supervising plaintiff's foster care placement, formulating plaintiff's treatment plans and making final decisions concerning his foster care placement and services provided to him.

6. Defendant ELLEN SISTI WADE, aka ELLEN RECEVEUR, is and, since approximately 1971, has been a Team Leader and Field Office Supervisor in the Louisville office of KCHR. As such, defendant WADE is responsible for implement-

ing KCHR policies affecting foster children under the jurisdiction and legal custody of KCHR and for directing, controlling and supervising all subordinates under her. During part of the time relevant hereto, including from 1978 through December 1982, defendant WADE was responsible for supervising defendants CHMILEWSKI and BIRD. During this time defendant WADE was a member of plaintiff's treatment "team" and was directly responsible, along with defendants CHMILEWSKI and BIRD, for coordinating services provided to plaintiff, monitoring and supervising plaintiff's foster care placement, formulating plaintiff's treatment plans and making final decisions concerning his foster care placement and services provided to him.

7. Defendant, SHERRY HAYDON BRUCE is and, since approximately 1978, has been a Foster Care Specialist in the Louisville office of KCHR. In this capacity defendant HAYDON serves as a program assistant to defendant BRUCE and is responsible *inter alia*, for the investigation of deficiencies in the quality of care being provided to children in state-licensed foster care homes in Jefferson County. Prior to becoming a Foster Care Specialist, and including the period from April 1975 through July 1976, defendant BRUCE was a Foster Care Team Leader in the Louisville office of KCHR. As such, defendant BRUCE was responsible for implementing KCHR policies affecting foster children under the jurisdiction and legal custody of KCHR and for directing, controlling and supervising all subordinates under her. During this time, defendant BRUCE was responsible for supervising defendant BALLARD. Defendant BRUCE was a member of plaintiff's treatment "team" and was directly responsible, along with defendant BALLARD for formulating plaintiff's treatment plans, coordinating services provided to plaintiff, supervising and monitoring plaintiff's foster care placement and making final decisions concerning his foster care placement and services provided to him.

8. Defendants MARY JOHNSON BALLARD, VERNA C. YOUNGMAN SCHWEICKHARDT, MARCIA MILLER PUROL, SUSAN M. CHMILEWSKI and PRUDA STEWART BIRD each are or were, during part of the time relevant hereto, social workers in the Louisville office of KCHR. Defen-

dant BALLARD was assigned by KCHR to plaintiff's case as a foster care worker from approximately April 1975 to July 1976; defendant SCHWEICKHARDT from approximately July 1976 to October 1977; defendant PUROL from approximately October 1977 to January 1981; defendant CHMILEWSKI from approximately January 1981 to September 30, 1982; and defendant BIRD from approximately October 18, to December 6, 1982. As foster care workers, defendants BALLARD, SCHWEICKHARDT, PUROL, CHMILEWSKI and BIRD were each directly responsible for supervising and monitoring plaintiff's foster care placement, coordinating services provided to plaintiff, plaintiff's foster care placement formulating plaintiff's treatment plan and making decisions about his foster care placement and services provided to him.

9. During all time relevant hereto each of the above-named defendants was acting in his/her official capacity and by virtue of his/her position as an employee of the Commonwealth of Kentucky.

10. Each of the above-named defendants is being sued for damages individually and solely in his or her personal capacity.

11. Plaintiff dose not know the true names of defendants sued herein as DOES One through Fifty, inclusive, and therefore sues these defendants by such fictitious names and will amend this Complaint to show their true names when ascertained. Plaintiff is informed and believes and, based on such information and belief, alleges that each of these defendants named herein as DOES One through Fifty, inclusive, is or was, during times relevant hereto an agent and/or employee of KCHR; that each was acting in his/her official capacity and by virtue of his/her position as an employee or agent of the Commonwealth of Kentucky; that each is responsible in some manner for the occurrences hereinafter alleged; and that plaintiff's injuries, as they are alleged *infra*, were proximately caused by the intentional, deliberately indifferent, arbitrary, negligent and/or malicious acts or omissions of each aforementioned defendant DOE. Each DOE defendant is being sued individually and in his/her personal capacity.

IV. FACTUAL ALLEGATIONS

A. Factual Background of Plaintiff

12. Plaintiff was born on August 30, 1973 in Louisville.

13. In February 1974 plaintiff was taken to a hospital emergency room in a comatose state by his mother.

14. Subsequently, a petition alleging suspected abuse of plaintiff was filed by the Jefferson County Metropolitan Social Services Division with the Jefferson County Court, Juvenile Division.

15. Plaintiff was never adjudicated to be abused, nor was there ever a finding made by any court that his medical condition as of February 1974 was the result of abuse by his mother or any other person. However, in April 1974, the Juvenile Court found plaintiff to be a dependent child pursuant to Kentucky Revised Statute Section 208.020 and committed him to the legal care, custody and control of KCHR.

16. In May 1974, plaintiff was released from the hospital. The medical diagnosis was that he had sustained a "cerebral contusion and possible basilar skull fracture." He was subsequently diagnosed as being blind, profoundly mentally retarded and having spastic cerebral palsy.

17. Plaintiff's physical and mental impairments substantially limit his major life activities. Plaintiff is non-ambulatory and non-verbal. He has limited movement of his arms and legs due to severe contractures, and he can neither grasp nor hold objects in his hands. He can not feed himself. He is not toilet trained. He is unable to attend to any of his bodily functions and so he must rely exclusively on others for his care.

B. Plaintiff's Foster Care Placement

18. Upon his release from the hospital, plaintiff was placed by KCHR pursuant to a "foster home agreement" in the state-licensed and approved foster family home of Blanche Smith, a sixty year old widow, residing in Louisville.

19. Plaintiff remained in Ms. Smith's home under her care for eight and one-half years. During this time legal custody and

responsibility for plaintiff remained with KCHR. Under Kentucky statutes and regulations plaintiff's placement in the foster family home of Ms. Smith was subjected to the continuing supervision and monitoring by KCHR. In addition, under Kentucky statutes and regulations, KCHR was required to periodically inspect and certify Ms. Smith's as a foster family home.

20. Ms. Smith was and became increasingly incapable of providing proper and adequate care to plaintiff or of meeting his extraordinary physical and other needs, as defendants knew or should have known had they adequately licensed Ms. Smith's home as a foster care home and properly supervised and monitored plaintiff's placement with her.

i. Abuse and Neglect of Plaintiff While in Foster Care

21. While placed in Ms. Smith's home, plaintiff was subjected to severe physical, medical, and emotional neglect and abuse over a prolonged period of time, including:

a. Ms. Smith failed to provide food to plaintiff in sufficient quantities and of adequate nutritional value to meet his dietary needs. On many occasions beginning in April 1975, nursing personnel at the C & Y Project, a pediatric clinic at which plaintiff was an out-patient, advised Ms. Smith that plaintiff's diet was nutritionally inadequate and the feeding techniques she was using were ineffective in assuring that he was being adequately fed. Subsequently, nursing and teaching personnel at the Churchill Park School, the special education school plaintiff attended, also informed Ms. Smith of these deficiencies. Both clinic and school personnel repeatedly gave instructions to Ms. Smith concerning a nutritionally adequate diet and proper feeding techniques for plaintiff. Ms. Smith was unable or unwilling to implement these instructions. As a result, plaintiff suffered from severe malnutrition throughout his placement with Ms. Smith. His weight was continuously well below the fifth percentile for the average weight of children of comparable age. During plaintiff's entire placement with Ms. Smith his weight never increased above 19 pounds, eleven ounces. On two occasions, once in January 1975 and again in January 1980, plaintiff was hospitalized in critical condition and suffering from severe dehydration

due to his improper diet and Ms. Smith's ineffective feeding techniques.

b. In September 1976, plaintiff was treated for a broken leg which, Ms. Smith claimed, was the result of an accident. The attending physician reported to defendants that the break, which was at least ten days old when seen by the physician, had not been accidentally caused.

c. Ms. Smith failed or was unable to properly provide physical therapy to plaintiff or to conduct other exercises medically prescribed to relieve severe contractures in his arms and legs caused by spastic cerebral palsy. As a result, plaintiff's contractures became more pronounced and severe preventing even minimal movement of his arms and legs and causing his body to assume a painful "windswept" position.

d. Ms. Smith repeatedly failed to keep plaintiff's medical appointments and so deprived him of the care that was critical for treatment of his multiple and serious handicaps.

e. Ms. Smith failed to obtain adequate dental care for and to provide adequate oral hygiene care to plaintiff. As a result of this failure, and coupled with his inadequate diet, plaintiff suffered from severe dental problems including inflamed and bleeding gums.

f. Ms. Smith failed to provide plaintiff with the minimal sensory and mental stimulation necessary for his development.

g. Ms. Smith failed to provide adequate personal hygiene care to plaintiff. Nursing and other medical personnel repeatedly reported to defendants that plaintiff's personal hygiene needs were not adequately met. On a number of occasions plaintiff was sent to school unbathed and dirty. On one occasion the nurse at Churchill Park School reported that plaintiff had a sore on his penis due to poor hygiene. On another occasion plaintiff was sent to school with roaches in his clothing.

ii. Notice to Defendants and Failure to Investigate

22. At all times relevant hereto, defendants were, pusuant to Kentucky statutes and regulations, under a duty and responsibility

to conduct a thorough and adequate investigation of all complaints of suspected child abuse or neglect of foster children committed to the jurisdiction of KCHR and placed in state-licensed foster homes, and take all necessary action to protect and safeguard the subject child and other children in the home from further abuse or neglect.

23. During plaintiff's placement with Ms. Smith the defendants received many complaints and reports from a variety of sources concerning suspected neglect and/or abuse of plaintiff and other foster children placed by KCHR with Ms. Smith. Such complaints and reports included the following:

a. In September 1976, defendants were notified that doctors had treated plaintiff for a broken left leg and did not believe that the fracture was accidental.

b. In September 1976, plaintiff's teachers at Churchill Park School informed defendants that plaintiff was losing weight on week-ends and they therefore feared that Ms. Smith was not adequately or properly feeding him.

c. In November 1981, the C & Y Project reported to defendants that plaintiff had missed his annual medical examination.

d. In January 1982, Churchill Park School officials complained to defendants that plaintiff had missed another scheduled medical examination.

e. In March 1982, Churchill Park School officials complained to defendants that plaintiff had been sent to school dirty and had burns on his elbows and that Sylvia J., another foster child placed with Ms. Smith, had bruises on her arms.

f. In April 1982, an anonymous caller complained to defendants that Sylvia J. had been seen with swollen eyes and scratches on her face.

g. In April 1982, Churchill Park School officials reported to defendants that Janetta B., a third foster child placed with Ms. Smith, had a burn on her leg.

h. In June 1982, Churchill Park School officials complained to defendants that plaintiff had a sore on his penis due to poor hygiene.

i. In June 1982, the nurse at Churchill Park School complained to defendants that plaintiff had repeatedly been sent to school filthy and that poor hygiene was adversely affecting his health.

j. In August 1982, the C & Y Project complained to defendants that plaintiff had insect bites in his eye, wax in his ear and that his gums were bleeding.

k. In September 1982, Churchill Park School officials complained to defendants that plaintiff's weight had dropped to 17 pounds over the summer months and that his gums were bleeding.

l. In September 1982, Churchill Park School officials complained to defendants that plaintiff had been sent to school with roaches in his clothing.

m. In October 1982, Churchill Park School officials complained to defendants that plaintiff had bruises and bites on his face, that his face was dirty and that his hygiene was seriously deficient.

n. In November 1982, Churchill Park School officials complained to defendants that Sylvia J. had bruises on her face and her lip was cut.

o. In December 1982, Churchill Park School officials complained to defendants that plaintiff's weight had continued to drop.

24. In each instance described in paragraph 23 above, defendants failed to conduct a thorough and adequate investigation of each such complaint and failed to timely remove plaintiff from the dangerous and unsuitable conditions existant in the foster home of Ms. Smith, all in violation of their legal duties and responsibilities to take such actions.

iii. Defendants' Failure to Timely Remove Plaintiff From Dangerous and Life-Threatening Conditions

25. In September 1982, after numerous complaints about the dangerously inadequate care being received by plaintiff, defendants finally decided to close Ms. Smith's home as a foster care facility and transfer plaintiff therefrom.

26. Defendants, however, failed to immediately remove plaintiff from Ms. Smith's home. Instead, he continued under Ms. Smith's care until December 1982, during which time he continued to be subjected to severe neglect and abuse causing his physical and mental condition to gravely deteriorate.

27. After repeated, unjustifiable delays, plaintiff was finally removed by KCHR from the foster care home of Ms. Smith in December 1982. At the time, plaintiff, who was then nine years old, weighed only 17 pounds, four ounces (when fully dressed). From Ms. Smith's home, plaintiff was immediately taken by his new foster mother to a pediatrician who found that plaintiff was suffering from severe malnutrition and numerous other serious medical ailments. Examination revealed that plaintiff's "extremities were wasted; there was no subcutaneous tissue and no fat. [Eugene] was indeed, skin and bones." He "could [not] have survived much longer in good health. Had he developed any kind of infection . . . he would have died within a few days."

FIRST CAUSE OF ACTION
(Civil Rights Claim — 42 U.S.C. Section 1983)

28. Plaintiff realleges and incorporates herein by reference, as if fully rewritten, paragraphs 1 throught 27, hereinabove.

29. In placing plaintiff in foster care and throughout his placement with Ms. Smith, defendants failed to:

a. adequately and properly screen and recruit a foster care placement for plaintiff that was appropriate, based upon and consistent with his special medical, physical and developmental needs;

b. adequately and properly train plaintiff's foster mother, Ms. Smith, and the social workers assigned to his case in the care and special needs of physically and developmentally handicapped children;

c. develop, implement and periodically and timely review a treatment plan for plaintiff that was appropriate, based upon his special physical, medical and developmental needs and in his best interests;

d. adequately and properly supervise and monitor plaintiff's foster care placement with Ms. Smith;

e. adequately and properly coordinate, monitor and supervise the provision of medical, rehabilitative, educational and other care and treatment of and services to plaintiff to insure that such care, treatment and services were being provided and were adequate to meet his needs and requirements;

f. adequately and thoroughly investigate all complaints received concerning possible abuse or neglect of plaintiff while place with Ms. Smith and timely remove plaintiff from Ms. Smith's home when defendants knew or reasonably should have known that conditions existed which were adverse to his health, safety, well-being and development.

30. In acting and failing to act as complained of above, and enumerated in paragraph 36, defendants acted recklessly, with deliberate indifference and/or with malicious intent to deprive plaintiff of his right to be free from bodily harm and unjustified intrusions upon his personal security and safety as guaranteed by the due process clause of the Fourteenth Amendment to the United States Constitution.

31. As a direct and proximate result of defendants' acts and omissions as described hereinabove, plaintiff has suffered and continues to suffer serious and permanent physical, developmental, psychological and emotional damages and injuries; he has experienced great and severe physical pain and prolonged discomfort; his physical and developmental growth has been severly and permanently stunted; his life expectancy has been dramatically shortened.

SECOND CAUSE OF ACTION
(General Negligence)

32. Plaintiff realleges and incorporates herein by reference, as fully rewritten, paragraphs 1 through 31, above.

33. In doing the acts and failing to act as complained of hereinabove and specifically enumerated in paragraph 29, defendants acted negligently. As a direct and proximate result of defendants' negligent actions and omissions plaintiff suffered injuries and incurred damages as described in paragraph 31 above.

THIRD CAUSE OF ACTION
(Negligent Compliance with Statutory Duties)

34. Plaintiff realleges and incorporates herein by reference, as if fully rewritten, paragraphs 1 through 33 above.

35. At all times relevant hereto, Kentucky statutes and regulations and KCHR policies and rules prescribed certain duties, responsibilities, standards and criteria for the licensing and monitoring of foster care homes and the placement and supervision of children in foster care homes in Kentucky. *See e.g.*, 905 KAR 1:005, 1:040, 1:085. Pursuant thereto defendants were required to place plaintiff in a foster home that reasonably provided for his physical and emotional needs and protected him from harm or injury. Defendants were also obligated to have regular face-to-face contact with plaintiff and Ms. Smith, to monitor and supervise Ms. Smith's home to ensure continuing compliance with appropriate standards of care, to coordinate all services provided to plaintiff and to investigate promptly and thoroughly complaints of suspected abuse and/or neglect of plaintiff in Ms. Smith's home.

36. In doing the acts and failing to act as complained of hereinabove and specifically enumerated in paragraph 29 above, defendants negligently failed to comply with the aforesaid laws and regulations of the Commonwealth of Kentucky and with KCHR's own policies and rules regarding the licensing and monitoring of foster care homes and the placement and supervision of children in foster care homes in Kentucky.

37. As a direct and proximate result of defendants' negligent failure to comply with the aforesaid statutes and regulations, plaintiff suffered injuries and incurred damages as described in paragraph 31 above.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that this Honorable Court:

1. Allow plaintiff to proceed in this action *in forma pauperis*.

2. Award to plaintiff compensatory and actual damages, jointly and severally, in an amount yet to be determined, against defendants;

3. Award to plaintiff punitive damages, jointly and severally, in an amount yet to be determined, against defendants;

4. Award to plaintiff his costs and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; and

5. Grant to plaintiff such additional or alternative relief as this Court may deem just, proper and equitable.

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Dated: December 17, 1985

Supreme Court, U.S.
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CLERK

No. 89-1651

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

EUGENE D.., a minor, by and through his mother and next friend, OLIVIA D., - - Petitioner

versus

JOHN R. KARMAN, JR., MARGERY TAYLOR CHAPLEAU, SHERRY HAYDON BRUCE, MARY JOHNSTON BALLARD, MARCIA MILLER PUROL, PRUDA BIRD, ELLEN RECEVEUR WADE, and VICKY YOUNGMAN SCHWEICKHARDT, - Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether there was a clearly established constitutional right to protection from harm in foster care during the period of May 1, 1974 to December 6, 1982?

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No. 89-1651

IN THE

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October Term, 1989

EUGENE D., a minor, by and through his mother and next friend, OLIVIA D., - - *Petitioner*

v.

JOHN R. KARMAN, JR., MARGERY TAYLOR CHAPLEAU, SHERRY HAYDON BRUCE, MARY JOHNSTON BALLARD, MARCIA MILLER PUROL, PRUDA BIRD, ELLEN RECEVEUR WADE, and VICKY YOUNGMAN SCHWEICKHARDT, - - *Respondents*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondents respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the decision of the Sixth Circuit Court of Appeals entered on November 13, 1989. That Opinion is reported at *Eugene D. By and Through Olivia D.* v. *Karman*, 889 F. 2d 701 (6th Cir. 1989).

COUNTERSTATEMENT OF THE CASE

This is a civil rights action brought under 42 U.S.C. 1983 by a severely mentally and physically handicapped child who has alleged that respondent social workers violated his constitutional right under the Fourteenth Amendment to the United States Constitution to be free from harm while in the custody and care of the State of Kentucky.

It is the position of the respondents (Karman) that there was (and is) no clearly established constitutional right to be protected from harm while in state foster care and therefore they are entitled to qualified immunity from liability.

Although the matter before this Court involves a pure question of law regarding whether there is a clearly established constitutional right to protection from harm while in foster care, Eugene's overall mischaracterization of what this matter involves as well as his misstatement of a number of facts, requires Karman to make certain corrections in order that this Court can make a proper disposition of the Petition for Writ of Certiorari.

As will be demonstrated, this case does not involve a situation in which a child was deprived of nutritional needs or medical care as Eugene would have the Court believe. Rather it involves a dispute over the proper care and treatment of a child who came into the care of the Kentucky Cabinet for Human Resources with a preexisting brain injury which caused him to be very severely or profoundly retarded, and also caused this child great difficulty in receiving proper nutrition and in gaining weight.

Factual Background

Eugene Douglas had no physical disabilities whatsoever when he was born August 30, 1973. (Dr. Sofia Franco deposition pp. 5, 6) (R. Nr. 77). On February 7, 1974, Eugene was taken by his mother to the Louisville General Hospital (Olivia D. deposition p. 4) (R.Nr. 84), in an epileptic coma and suffering from constant seizures. (Franco deposition p. 7). According to pediatric neurologist, Dr. J. William Holmes, the head trauma that he suffered at this time along with cardiorespiratory arrest

caused Eugene's neurological impairment which Dr. Holmes described as very severe or profound. (Dr. J. William Holmes deposition pp. 10, 11) (R.Nr. 96). Upon his discharge from the hospital on March 14, 1974, his final diagnosis was a cerebral contusion and possible skull fracture at the base of the skull. (Franco deposition p. 7). After an approximate 6 week stay at a convalescent home, Eugene was placed in foster care in the home of Blanche Smith on May 1, 1974. He remained there until December 6, 1982 when he was placed in the foster home of Judy Harrison. (Judy Harrison deposition p. 8) (R.Nr. 74). It is this eight and one-half year period that is the relevant time period for purposes of determining whether there was a clearly established constitutional right to protection from harm in foster care.

At page 3 of his Petition, Eugene alleges that on the day of his removal from the Smith foster home he was found to be suffering from starvation and that the pediatrician who saw Eugene on this day told officials that any type of infection would have led to his death in a matter of days. That pediatrician, whose name is Dr. Betty Wolf, testified that on this day, December 6, 1982, Eugene was not in a life-threatening situation; (Dr. Betty Wolf deposition p. 18) (R.Nr. 71); that he was not suffering from any kind of infection, dehydration, abrasions, bedsores or vomiting, (Wolf deposition p. 15); and though she was aware of her duty as a physician to report any case she believed to constitute the possibility of abuse or neglect, she did not make such a report in this instance. (Wolf deposition, p. 17, 18). Moreover, rather than suffering from starvation, Dr. Wolf stated that she believed Eugene was malnourished when she saw him in December, 1982 at the weight of 17 lbs. 4 oz. (Wolf deposition p. 22). In

addition, when she was advised of his weight range of between 20 lbs. 14 oz. and 22 lbs. 11 oz. at various times in 1984 and 1985 when Eugene was back in his mother's care, Dr. Wolf was of the opinion that Eugene was still malnourished. (Wolf deposition pp. 73-77).

It should also be noted that Judy Harrison, who cared for Eugene after his removal from the Smith foster home from December 1982 through December 1983, testified that Eugene's weight leveled off at 21-22 lbs. during this period. (Harrison deposition p. 31). Thus, Eugene's statement at page 7 of the Petition that he weighed 26 lbs., nine months after his removal from the Smith foster home while somewhat accurate,[1] failed to advise the Court that this weight gain was not maintained for any length of time. In fact, from January 1984 through April 1986, while in his mother's care, Eugene's weight never rose above 22 lbs. 12 oz. and sunk as low as 19 lbs. 9 oz. (Trudi Bellou deposition pp. 15, 16, 28) (R.Nr. 73). This lack of weight gain occurred despite the efforts of Trudi Bellou, a nutritionist with the Louisville Jefferson County Health Department, who worked with Eugene to improve his weight from March 1984 up through the time of her deposition in May 1986. Ms. Bellou agreed with Dr. Wolf that based on his weight during this period, Eugene was malnourished. (Bellou deposition p. 36).

Finally, in April 1986, because, according to Ms. Bellou, everything else had been tried "to enhance oral intake and weight gain" (Bellou deposition p. 30) a gastrostomy tube was inserted surgically in Eugene's abdomen to make it easier to feed him and avoid infections. (Dr. Lawrence

[1]The deposition of Betty Wolf indicates this weight was achieved in May, 1983 or five months rather than nine months after his removal. (Wolf deposition p. 74).

Jones deposition p. 21) (R.Nr. 97). This procedure followed a barium swallow esophogram performed in December 1985 which showed that Eugene suffers from "considerable muscular incoordination in initiating the swallow mechanism." (Bellou deposition p. 26). The gastrostomy tube is a rubber catheter that is inserted through the abdominal wall and connects to the inside of the stomach and is secured there. Food is then poured directly through the tube into the stomach. (Jones deposition p. 22). Three months after insertion of the tube, in mid-September 1986, Eugene weighed approximately 40 lbs. (Holmes deposition p. 23), or almost twice the 20 lbs. 13 oz. he weighed on April 17, 1986 shortly after the tube was inserted. (Holmes deposition p. 21).

Thus, a fair representation of the facts demonstrates that three years after his removal from the Smith foster home, Eugene had shown only a slight weight gain and the very doctor Eugene relied upon in his Petition to this Court, testified that Eugene was still malnourished during this three year period despite the assistance of a nutritionist. Furthermore, the nutritionist, Trudi Bellou, admitted that the gastrostomy tube, which produced a rapid weight gain, was used because all else had failed. This hardly describes a situation where a child was deprived of nutrition. Rather it illustrates a profoundly retarded child's problems in receiving sufficient nutrition.

Eugene has also alleged that his medical needs were continually neglected. (Petition p. 5). The record shows that while in the Smith foster home, Eugene was seen nineteen times at the Children and Youth Project, (C & Y Clinic), which is a state funded medical clinic whose mission is "to provide comprehensive health care to high-risk infants and children born either premature or high risk

or indigent status." (Franco deposition pp. 4, 10, 11). He was seen by a nutritionist at the C & Y Clinic on nine occasions and the nutritionist also made seven home visits to Eugene. The basis for this monitoring was Eugene's profound retardation and difficulty in gaining weight. (Franco deposition p. 14).

The home visits were discontinued only when Eugene enrolled in Churchill Park School in February 1978. Churchili Park School, which Eugene attended until he left for the Harrison foster home in December, 1982, is a school specifically designed for severely and profoundly handicapped and retarded children. (Frederick J. Goeschel deposition p. 3) (R.Nr. 80). While at Churchill Park School, Eugene daily received at least 15 minutes of exercise prescribed for the contractures he suffered from as a result of his condition. (Candace Harwell deposition p. 5) (R.Nr. 78).

While in Ms. Smith's foster home, Eugene was also seen at United Cerebral Palsy Clinic a total of fifteen times. (Dr. Walter E. Badenhausen deposition pp. 4-17) (R.Nr. 107). Dr. Badenhausen, an orthopedic surgeon and Medical Director of the United Cerebral Palsy Clinic, (Badenhausen deposition pp. 2, 4), testified that Eugene had surgery in March 1982 to relieve his contractures, but it was unsuccessful. (Badenhausen deposition p. 13). He also noted that even though Eugene missed some appointments at the Clinic, he was seen regularly. (Badenhausen deposition p. 29). As for the demineralization of Eugene's bones alluded to by Eugene at p. 7 of his Petition, Dr. Badenhausen stated that he would expect the bones of such a child to be "very, very osteoporotic" because they do not bear weight. (Badenhausen deposition p. 19).

At p. 5 of the Petition, Eugene has alleged that no investigation of his broken leg in August 1976 was ever conducted. This is simply not borne out by the record. First of all, the physician who examined Eugene did not express an opinion one way or the other as to whether it was an accident, (Franco deposition p. 34), but rather requested an investigation only "to be certain that the story was correct." (Franco deposition p. 32). Secondly, a letter from Sherwin L. Spero, Chief Social Worker at the C & Y Clinic, dated September 2, 1976, shows that Mr. Spero referred the matter to a county agency, the Metropolitan Social Services Department, rather than the Cabinet for Human Resources. (R.Nr. 109 Children & Youth Clinic Records attached as Exhibits to deposition of Rose Gorke, Custodian of Records.). (Franco deposition p. 33). Moreover, a service recording made by the social worker at the time, Mary Johnston Ballard, demonstrates that she immediately followed up a conversation with Mr. Spero regarding the incident with a home visit to discuss the situation wth Ms. Smith. (Deposition of Mary Johnston Ballard, Exhibit 1) (R.Nr. 53).

Eugene alleges at p. 5 of his Petition that medical professionals began to suspect that Ms. Smith was using improper techniques in feeding Eugene. What he does not tell this Court is that these same medical professionals, the C & Y Clinic personnel, changed their mind and concluded that the techniques Ms. Smith had been using were correct after all and that they had been wrong! (Franco deposition pp. 16,17).

Eugene implies at p. 6 of his Petition that complaints from Churchill Park School personnel went unheeded. However, the testimony of Margaret Frederick, who in-

vestigated this allegation following a complaint by Judy Harrison, found that these reports:

> . . . were, in fact, heeded and that every allegation that came to the attention of the Department's workers was addressed. Home visits were made to observe Eugene's condition, to talk with Mrs. Smith. Anytime the allegation indicated a medical problem or an impact on the child's physical health, then a subsequent contact was made with the medical community who were addressing Eugene's physical needs.
>
> Margaret Frederick deposition p. 10 (R.Nr. 83).

Eugene also attempts to blame "defendant social workers" for taking two years to obtain a wheelchair for Eugene. (Petition pp. 5, 6). According to Judy Harrison, Eugene's foster parent from December, 1982 to December, 1983, this wheelchair was ordered by a therapist at Churchill Park School which is not affiliated with the Cabinet for Human Resources. (Harrison deposition p. 30).

Thus, a fair representation of the facts regarding Eugene's medical needs shows that he was not deprived of medical care during his stay in Blanche Smith's foster home as he has alleged.

REASONS FOR DENYING THE PETITION

In rendering its decision that respondents were entitled to qualified immunity from liability because there was no clearly established constitutional right to protection from harm in foster care during the period of May 1, 1974 to December 6, 1982, the Sixth Circuit properly applied the principles governing qualified immunity set forth by this Court in *Harlow* v. *Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) and *Anderson* v. *Creighton*, ___

U.S. ___, 107 S. Ct. 3034 (1987). Because the Sixth Circuit properly applied the law with regard to such concepts as the level of specificity at which a constitutional right must be defined and the factual similarity necessary between cases to clearly establish such rights, there is no conflict between its decision and those of the Supreme Court or other Circuits.

Additionally, the approach taken by the Sixth Circuit with respect to caselaw outside the Sixth Circuit is consistent with the "objective legal reasonableness" test of *Harlow, supra,* and does not represent a substantive difference from other circuits' approaches.

This Court's opinion in *DeShaney* v. *Winnebago County Department of Social Services,* ___ U.S. ___, 109 S. Ct. 998 (1989), which clarified the law regarding the rights of foster children, was not misread by the Sixth Circuit or other circuits that have interpreted this decision. As such, there is no need to review this case in light of *DeShaney.*

DeShaney did establish an affirmative duty of protection standard that can be applied to situations involving persons in state custody. However, because this decision was not made until February 22, 1989 and because the law must be clearly established as of the time of the events in question, a decision in this matter that would clearly establish that a constitutionally imposed affirmative duty of protection exists in foster care could not apply to *Eugene D.* whose relevant time period ended on December 6, 1982. Therefore, review of the *Eugene D.* case by this Court would not be appropriate.

I

The Sixth Circuit's Characterization of the Level of Specificity Necessary to Clearly Establish a Constitutional Right Does Not Conflict with This Court's Holding in *Anderson* v. *Creighton*.

There is no conflict between the Sixth Circuit's decision in *Eugene D.* v. *Karman*, 889 F. 2d 701 (6th Cir. 1989) and *Anderson* v. *Creighton*, ___ U. S. ___, 107 S. Ct. 3034 (1987) because the Sixth Circuit applied the principles regarding the level of specificity at which a constitutional right is clearly established in a manner consistent with the *Anderson* case's application. In both cases, the Courts found three levels of specificity. On the first level was the basic constitutional guarantee, such as the right to due process. The second level consists of a general constitutional right that springs from the basic right. The third level involves the circumstances where the right is applied and the right becomes particularized.

Using the Due Process Clause as an example, this Court in *Anderson* noted that the right to due process is "quite clearly established by the Due Process Clause." *Id.* at 3038. The Court then pointed out that any action which violates the Due Process Clause in a sense violates a clearly established constitutional right regardless of how unclear it is that the particular action is a violation. *Id.* at 3038. However, the Court stated that if this was the level at which a clearly established right was to be found, "it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of Harlow." *Id.* at 3039. This is the first and most abstract level of the clearly established law analysis. In applying this analysis to the facts in *Anderson*, this most abstract level is found in the Fourth

Amendment's proscription against unreasonable searches and seizures. The second level, in which a general constitutional right is found to emanate from the basic right, is the right to be free from warrantless searches of one's home unless there was probable cause and exigent circumstances. *Id.* at 3039. The third level, which this Court believed was sufficiently particularized, and thus able to put a reasonable official on notice that he was violating a constitutional right, required an examination of the circumstances facing the searching officer when he made the warrantless search. *Id.* at 3040.

The Sixth Circuit, in analyzing Eugene's claim that his right to due process under the Fourteenth Amendment had been violated, adopted this same three level approach. First of all, the right to due process, guaranteed by the Fourteenth Amendment, as this Court pointed out in *Anderson* is the first and most abstract level. The Sixth Circuit, citing this Court's decision in *DeShaney* v. *Winnebago County Department of Social Services*, ___ U.S. ___, 109 S. Ct. 998 (1989), recognized that the second level, which stems from the more basic right to due process, was the right in certain instances to protection from harm while in state custody. However, the Sixth Circuit found that for a right to be sufficiently particularized so as to put a reasonable social services official on notice that he or she was violating a constitutional right, it must reach a third level where the circumstances under which this right of protection while in state custody are identified. The Sixth Circuit, in *Eugene D.*, pursuant to *DeShaney* at 1005, concluded that at this level the right to such protection had been clearly established only in the institutional and prison settings prior to December 6, 1982, *supra* at 710-711. Thus, rather than extend official immunity beyond the bounds of

reason and common sense, the Sixth Circuit properly applied the principles set forth in *Anderson, supra,* in determining the right argued by Eugene has not yet been clearly established in the foster care setting.

II.

The Sixth Circuit's Decision in *Eugene D.* Does Not Conflict with *Anderson* v. *Creighton* or *Harlow* v. *Fitzgerald* Regarding the Need for Factual Similarity.

Eugene greatly overstates the case when he argues that the Sixth Circuit required "factual circumstances virtually identical" to the *Eugene D.* case in order to defeat the claim of qualified immunity. As noted in the preceding section, the Sixth Circuit followed the *Anderson* decision *supra,* by requiring that a general constitutional right, such as protection from harm while in state custody, be particularized by setting forth the circumstances under which such a right applies before declaring that right to be clearly established. Under the "objective legal reasonableness" standard of *Harlow, supra,* the Sixth Circuit in *Eugene D.* did not find that the institutional setting described in *Youngberg* v. *Romeo,* 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982) or the prison setting of *Estelle* v. *Gamble,* 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976) would put a reasonable social services official on notice that he was violating a constitutional right. At 711, the Sixth Circuit in *Eugene D.* states that:

> At some later date our circuit or the Supreme Court may definitively decide whether the placement of a child in a state licensed foster home which is supervised by state agents is sufficiently analogous to institutionalization to give rise to a constitutionally imposed affirmative duty to protect. However, we are convinced

> that the differences are sufficient to require us to hold under an objective legal reasonableness standard, that it was not clearly established at any time during the relevant period that such an obligation existed by virtue of the Constitution.

The Sixth Circuit followed this passage with the statement that for similar reasons, it also found no such duties in the Eighth Amendment setting of *Estelle, supra.*

Clearly, all the Sixth Circuit requires here is that the factual setting be recognizable to social service personnel. This degree of similarity to the case at hand can hardly be characterized as requiring virtually an identical fact situation. Rather, the Sixth Circuit, by refusing to accept the "distinct contexts" of institutionalization or prison as sufficient notice to social workers, followed this Court's admonition in *Anderson* not to allow plaintiffs "to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability. . ." *Id.* at 3039.

III.

The Sixth Circuit's Decision in *Eugene D.* Does Not Conflict with the Approach of the Third, Eighth and Tenth Circuits on the Determination of Whether the Law is Clearly Established.

Eugene cites several cases collected from the Third, Eighth and Tenth Circuits as adopting an approach which he contends is in conflict with the approach taken by the Sixth Circuit in determining whether a legal rule is clearly established. He describes this approach as "requiring some but not precise factual correspondence and demanding that officials apply general well-developed legal principles." (Petition at 19.)

Although the Sixth Circuit has not repeated this formula verbatim, the Court's approach is unquestionably consistent with these other Circuits' approach. The fact the Sixth Circuit in *Eugene D.* indicates that only the broad question of whether placement in a foster home supervised by state agents would impose a constitutional duty of protection need be decided by this Court or the Sixth Circuit before applying to a situation like Eugene's demonstrates that the Sixth Circuit does not require the precise correspondence of facts that Eugene alleges. In requiring that the setting at least be that of foster care, the Court is following the holdings in *Anderson, supra* and *Harlow, supra* regarding the "objective legal reasonableness" standard and the level of specificity or factual similarity necessary for an official to be put on notice that what he or she is doing violates a clearly established constitutional right. A precise correspondence of facts would consist of a child in foster care with severe medical problems like Eugene who allegedly does not receive appropriate care and treatment for these problems. The Sixth Circuit decision in *Eugene D.* cannot in any way be read to require such similarity.

IV.

No Precise Rules are Necessary Nor Is There Any Substantive Conflict Between the Circuits in Evaluating the State of the Law for Purposes of Qualified Immunity.

Eugene argues that no precise rules have been set forth to determine what precedent should be used in deciding whether a constitutional right is clearly established. He points to *Harlow* v. *Fitzgerald, supra,* as reserving this question at 457 U.S. at 818, 102 S. Ct. at 2738 n. 32 when the Court stated that: "[a]s in *Procunier* v. *Navarette* we

need not define here the circumstances under which 'the state of the law' should be evaluated by reference to the opinions of this Court, of the Court of Appeals or of the local District Court." (Petition at p. 21.) However, the fact that this Court in *Procunier* v. *Navarette,* 434 U.S. 555, 98 S. Ct. 855, 55 L. Ed. 2d 24 (1978) required an "evaluation" of the state of the law in determining whether a right is clearly established, suggests that precise rules would not be appropriate for such a determination. In fact, there is a need for flexibility in evaluating the state of the law because seldom, if ever, do facts present themselves in the same way in two different cases nor do Courts analyze facts in the same manner. Imposing precise rules to govern the determination as to whether a legal rule is clearly established would be unduly restrictive and impractical.

With respect to the evaluation of the state of the law, Eugene has cited *Wood* v. *Ostrander,* 879 F. 2d 583 (9th Cir. 1983) as using an approach that conflicts with the approach used by the Sixth Circuit in deciding *Eugene D.* Eugene thus believes that review by this Court is necessary to resolve the conflict. As the ensuing discussion will demonstrate, it is the description of the evaluation method that is different not the approach itself.

In *Eugene D.,* the Sixth Circuit used a broad and balanced approach. When reviewing decisional law, the Court looked first and most importantly to the decisions of the Supeme Court and then to those of the Sixth Circuit. If guidance was not available in these sources, the Court looked to decisions of other circuits and then to decisions of the highest state court. Recognizing that the law must be *clearly* established, the Sixth Circuit concluded that a single case from another circuit would not be sufficient to

satisfy this standard. *Id.* at 706. However, such an approach does not foreclose the use of decisions of other circuits and in fact takes into consideration state law decisions as well.

In *Wood,* the Ninth Circuit pointed out that a factually similar decision from another Circuit, *White* v. *Rochford,* 592 F. 2d 381 (7th Cir. 1979)[2] "did not necessarily establish law for this circuit." *supra* at 593. Only after noting that the Seventh Circuit's decision in *White* had *established* the point of law regarding a police officer's creation of a danger to individuals; that two subsequent cases from the Seventh Circuit had *"clearly articulated"* the law, *Id.* at 594; and that a decision from the Ninth Circuit, *Escamilla* v. *City of Santa Ana,* 796 F. 2d 266 (9th Cir. 1986) had cited one of the Seventh Circuit decisions with approval, did the Court in *Wood* conclude that the law was clearly established at the time of the events in its case and that it would have come to the same result as the Seventh Circuit in *White.*

Thus both the Court in *Eugene D.* and in *Wood* looked to other circuits for guidance in the absence of Supreme Court authority or similar cases in their circuits. The mere fact that the Ninth Circuit has chosen to describe its process as looking at whether it would have decided a similar case the same way another circuit had decided a previous matter presents no substantive difference from the Sixth Circuit looking to other circuits for guidance in determining whether the law was clearly established.

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[2]Both cases involved a police officer who arrested the driver of a car and then left the occupants of the car to fend for themselves. In *Wood,* it was a woman while in *White* it was children.

V.

District Court Decisions from Foreign Jurisdictions Do Not Clearly Establish Constitutional Rights.

Eugene has also argued that certain District Court decisions, *Brooks* v. *Richardson,* 478 F. Supp. 793 (S.D. N.Y. 1979) and *Gary W.* v. *State of Louisiana,* 437 F. Supp. 1209 (E.D. La. 1976) were ignored by the Sixth Circuit in *Eugene D.* (Petition at p. 12.) Eugene fails to point out that as for such cases' precedential value, he himself has argued that only local District Courts were to be consulted with reference to the state of the law at the time in question. In his Response to Defendants' Motion to Dismiss, R.Nr.14, filed January 16, 1985 with the U.S. District Court for the Western District of Kentucky, Eugene argued at pp. 26-27, that: "[d]etermination of the state of the law at the time of the acts or omissions complained of is to be made by 'reference to the opinions of (the Supreme) Court, of the Courts of Appeals, (and) of the *local District Court.' Procunier* v. *Navarette,* 434 U.S. 555, 565 (1978)" (emphasis added). In line with this Court's statement in *Procunier* is the analysis by the Sixth Circuit to the effect that the "objective legal reasonableness" test of *Harlow* "does not require state officials to know and follow the most advanced state of the law as established by a remote court of the land." *Eugene D.* at 708.

VI.

DeShaney v. *Winnebago County Department of Social Services* Clarifies Rather Than Confuses the Law Regarding the Constitutional Rights of Foster Children.

Eugene argues at p. 26 of his Petition that review by this Court is necessary because the *DeShaney* decision

caused confusion among circuits who have misread the case as having decided an issue on which the court has explicitly expressed no opinion, i.e. the validity of the analogy between foster care and incarceration and institutionalization. Such an assertion clearly does not apply to the *Eugene D.* decision. On the contrary, the Sixth Circuit's explicit statement at 711 that at some later date, either the Sixth Circuit or the *Supreme Court* could definitively decide whether foster care placement is sufficiently analogous to institutionalization to give rise to an affirmative duty of protection provides incontestable proof of the inaccuracy of Eugene's statement.

The same can also be said of both *Milburn* v. *Anne Arundel County Department of Social Services,* 871 F. 2d 474 (4th Cir. 1989) cert. denied ___ U.S. ___, 110 S. Ct. 148 (1989) and *Stoneking* v. *Bradford Area School District,* 882 F. 2d 720 (3rd Cir. 1989) cert. denied sub nom. *Smith* v. *Stoneking,* ___ U.S. ___, 110 S. Ct. 840 (1990) which Eugene also cited. In both instances, the Courts noted that the Supreme Court expressed no opinion as to the validity of the analogy between foster care and institutionalization and incarceration, *Milburn* at 476 and *Stoneking* at 724.

With respect to *Taylor* v. *Ledbetter,* 818 F. 2d 791 (11th Cir. 1987) (en banc) cert. denied ___ U.S. ___, 109 S. Ct. 1337 (1989), which Eugene admits at p. 20 of his Petition did not involve the issue of qualified immunity, it is obvious that *DeShaney* did not confuse the Eleventh Circuit because it made its decision well before *DeShaney* was decided.

Eugene apparently is trying to imply some confusion on the part of the Sixth Circuit when he notes at p. 24 of his Petition that the Sixth Circuit rejected case law cited by Eugene after the Court acknowledged in its opinion that

DeShaney had made clear that cases cited by Eugene "can be read to support his assertion that the Due Process Clause of the Fourteenth Amendment imposes affirmative duties on the state whenever it takes an individual into custody" *Eugene D.* at 709. What Eugene fails to note is that the Sixth Circuit properly held that with regard to Eugene's case this "explicit statement" of the Court in *DeShaney* could not be relied on "to establish such obligations during a period ending some six years earlier." *Id.* at 710. Additionally, the Sixth Circuit pointed ont that the "gloss" that *DeShaney* applied to case law cited by Eugene was obviously not available to the defendants in the relevant time period of May, 1974 to December, 1982. *Id.* at 710.

Moreover, rather than confuse, Karman believes the *DeShaney* case has done much to clear up the law in this area. First of all, the Court laid down a general right and duty emanating from the Due Process Clause of the Fourteenth Amendment, i.e. an affirmative duty of protection when the state takes a person into custody and holds him there against his will. Secondly, by noting that only in the circumstances of incarceration and institutionalization did the Constitution impose "upon the State affirmative duties of care and protection with respect to particular individuals" *Id.* at 1004-1005, the Court particularized the right to protection so that it was clearly established in those two instances. Thirdly, this Court did not extend such a right and corresponding duty to the foster care setting during the course of its opinion in *DeShaney*. As evidenced by its statement at 1006, fn. 9, this Court expressed no view on the validity of the analogy between foster care and incarceration and institutionalization.

The clarity of *DeShaney* is further demonstrated by the similar results reached in *Eugene D.* and *Doe* v. *Bobbitt*,

881 F. 2d 510 (7th Cir. 1989). These are the only two cases cited by Eugene that fit within the foster care situation described in *DeShaney* at 1006, fn. 9, i.e. "[h]ad the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home . . ."[3] In both instances, the Courts concluded that there was no constitutional right to protection from harm in foster care that had been clearly established either by December, 1982 in *Eugene D.* or by 1984 in *Doe*. It is thus clear that *DeShaney* presents no basis to review *Eugene D.*

VII.

Eugene D. v. *Karman* is Not an Appropriate Case to Determine Whether There Is A Constitutional Right To Protection From Harm in Foster Care.

The *DeShaney* case's announcement that in certain circumstances there is an affirmative duty of protection when the state takes a person into custody and holds him there against his will provides the standard by which this Court can determine whether there exists a clearly established constitutional right to protection from harm while in foster care when the appropriate case is presented to it. Such a case would be appropriate if any part of the time period in question involved events occurring after February 22, 1989 when *DeShaney* was decided. Before that time there was not identifiable standard or general constitutional duty that could be applied to all situations when a person was taken into state custody. Such a standard makes it possible

[3]The other cases cited by Eugene, *Milburn* v. *Anne Arundel County Department of Social Services*, *supra* and *Stoneking* v. *Bradford Area School District*, *supra* are distinguishable. *Milburn* involved a child who was voluntarily placed in a foster home by his parents while *Stoneking* dealt with harm directly inflicted by a state employee.

for this Court or a lower court to determine the existence of a constitutional right in the foster care setting based on the state of the law on February 22, 1989. As the events in question in the *Eugene D.* case took place between May 1, 1974 and December 6, 1982, it is not an appropriate case to answer such a question.

CONCLUSION

For the reasons stated above, Respondents pray that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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